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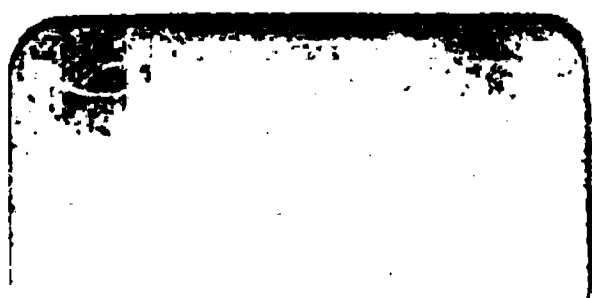
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IN THE

SUPREME COURT

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OF THE

STATE OF NEW YORK.

BY R. M. STOVER,  
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VOLUME LXVII.

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# PRACTICE REPORTS.

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## SUPREME COURT.

ROBERT F. LITTLE, as receiver, &c. agt., ~~THERESA~~ LYNCH.

*Code of Civil Procedure, section 1019 — Right to terminate reference — Referees must file his report with clerk, or actually deliver to a party within sixty days.*

A referee, under section 1019 of the Code of Civil Procedure, will not have done his duty unless he delivers his report to the clerk to be filed in case it is not taken up by one of the attorneys within sixty days.

Notification to the plaintiff's or defendant's attorneys by the referee that his report is ready and at their disposal, on payment of his fees (naming the amount), is not to be deemed a sufficient delivery to prevent the forfeiture of his fees or the termination of the reference under this section of the Code.

(See *Thornton* agt. *Thornton*, 66 *How.*, 119, where the same cases are cited and a different conclusion reached by HAIGHT, J.)

*Special Term, May, 1884.*

*William T. B. Milliken*, for plaintiff.

*Abram Kling*, for defendants.

LAWRENCE, J. — By the order in this case the defendant is directed to show cause why the referee's report, filed herein on or about the 5th day of March, 1884, should not be taken from the files and the judgment entered thereon should not be vacated, set aside, canceled, &c., for the reason that the same was filed and entered irregularly, in that the reference herein had been terminated before the delivery or filing of said report and the entry of said judgment by the notice of termination, served by the plaintiff, and why the judgment for costs should not be set aside for the additional reason that costs had been remitted and waived by the defendant, and why such other and further relief should not be granted as may be just. By the affidavit of the plaintiff's attorney it is

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alleged that said attorney was informed by the referee that the papers purporting to be his report herein were not delivered until after the 1st of February, 1884, and that no fees were paid to him as referee until long after the 28th of June, 1882, at which time he was notified that the reference had terminated by the election of the plaintiff, &c., and that said referee had never at any time filed said report, and that only a portion of said fees have ever yet been paid. That by the judgment-roll herein it appears that the report of said referee was not completed until the 6th of February, 1884, at which time it bears date. Among the plaintiff's motion papers is also a stipulation on the part of the defendant that in case judgment shall be rendered in her favor, either at the trial or on appeal to the general term or court of appeals, the defendant waives all right to any costs or allowances in this action as against the plaintiff, either personally or as receiver or against any other person whomsoever, and the defendant thereby agrees that any and all judgments rendered herein in her favor shall be entered without costs. This stipulation bears date November 18, 1880, *and is signed by the attorney for the defendant.* By the affidavit of the plaintiff it appears that the order of reference was made on the consent of both parties, and was entered on the 5th of April, 1881, and that the case was finally submitted to the referee on the 26th day of April, 1882. It is also alleged that the report of the referee was neither filed or delivered to either of the parties or their attorneys in said action, nor were any fees paid to said referee within sixty days after said final submission, nor until after the 28th day of June, 1882, on which day, and after the expiration of said sixty days due notice of the election of the plaintiff to end such reference was duly served upon the attorney of the defendant. By the affidavit of the referee, read on the part of the defendant, it appears that he decided this action in May, 1882, and made his final report therein, and offered to deliver it to defendant's attorney, and told him he could have the same on the payment of the

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legal fees ; that this was done within the sixty days from the time of making the said report, and that the said fees were not paid. The defendant swears in her affidavit that she paid to her former attorney all fees which he claimed for services, and which he required for taking up the referee's report, which fees the said attorney stated were about \$250 ; that this was at or about the time when the case was decided. She also alleges that she never at any time authorized her attorney to sign the stipulation which forms a part of the plaintiff's motion papers, or to waive any costs or disbursements in this action, and that she never knew that a stipulation to that effect had been given until the month of February, 1884. It also appears by the affidavit of the present attorney for the defendant, that in February, 1884, he made a motion to vacate two orders restoring this cause to the general calendar of the court, on the ground that the action had been terminated by the report of the referee, and that the court so held, as appears by the order made on the 21st of February, 1884.

In the case of *Waters* agt. *Shepard* (14 Hun, 223), the general term of the second department distinctly held that where the referee had made his report within sixty days after the final submission, and had notified the parties of its terms, and that it could be obtained on application from him, the defeated party could not thereafter elect to end the reference, although the report was left in the hands of the referee. But the same general term, in the case of *Phipps* agt. *Carman* (23 Hun, 150), decided that the binding force of *Waters* agt. *Shepard* had been destroyed by the Code, as altered since that decision was made, and it was held that the referee, under section 1019 of the Code of Civil Procedure as changed, and as it now stands, *will not now have done his duty unless he delivers his report to the clerk to be filed in case it is not taken up by one of the attorneys within sixty days.*

The case of *Waters* agt. *Shepard* appears to have been decided under the 273d section of the old Code, for which section 1019 of the present Code is substituted, and the later

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decision of the general term of the second department seems to be in accordance with the existing provisions of the Code. I regret, therefore, to be compelled to come to the conclusion that this motion, so far as it rests upon the first ground, should be granted. The law, as thus declared, leaves a referee in an exceedingly defenceless position, but that is a matter which must be left for the consideration of the legislature, and I cannot, on account of the apparent hardship of the case, assume to disregard the strict letter of the law. I do not regard the order of the 21st of February, 1884, which vacated certain orders restoring this cause to the calendar of the court, as estopping the plaintiff from raising the question now under consideration.

The remarks of RAPALLO, J., in the case of *Geib* agt. *Topping* (83. N. Y., 46, 48) were *obiter*, and it is distinctly stated by the learned judge that the question as to what should be deemed a sufficient delivery of a report to prevent the forfeiture of fees, declared by section 1019 of the Code of Civil Procedure, need not be definitely decided. The order then under review was reversed for want of power in the special term to make the original order. Furthermore, in the 84th volume of the New York Reports (*page* 650), the case of *Phipps* agt. *Carman* was affirmed, and the latter case must, therefore, be deemed to contain the latest opinion of the court of appeals upon this subject. The case of *Quackenbush* agt. *Johnson* (55 How. Pr., 94), which is relied upon by the learned counsel for the defendants, was decided at a special term by justice NOXON in 1878, and is in conflict with the views expressed by the general term of the second department in *Phipp* agt. *Carman*, and, therefore, cannot be followed by me. It is unnecessary, in the view in which I have taken of this case, to consider the question whether the defendant's attorney was authorized to give the stipulation referred to, and made a part of the moving papers.

The motion to vacate and set aside the judgment must, therefore, be granted, but without costs.

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N. Y., Lake Erie and Western R. Co. agt Supervisors of Delaware Co.

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## SUPREME COURT.

THE NEW YORK, LAKE ERIE AND WESTERN RAILWAY  
COMPANY agt. THE BOARD OF SUPERVISORS OF DELAWARE  
COUNTY.

*Taxes and assessments—Power of commissioners of highways to assess moneyed and stock corporations for highway labor in a road district other than that in which the property of such corporations is situated—Repeal of statutes—Laws of 1837, chapter 431—Laws of 1866, chapter 477.*

Repeals of statutes by implication are not to be favored, but on the contrary courts are bound to uphold the former statute, if the two acts can stand together, unless it is expressly repealed, or the intent to repeal is very manifest.

To work a repeal by implication, the intent of the legislature must be very apparent, or the two laws must be so incongruous and repugnant that effect cannot be given to both.

A special law providing for a case, or class of cases, is not to be regarded as partially repealed or amended by a general statute, unless the intention of the legislature to alter that particular law is very obvious.

When it is manifest that the legislature intended the latter statute as a substitute for the former, the latter may abrogate the former, although not entirely repugnant to it.

Applying these rules to the statute of 1837, providing for the assessment of highway labor upon moneyed or stock corporations:

*Held*, that the statute of 1866 was not intended to repeal that of 1837, and that it was not intended as a substitute for it, or any part thereof; but that it was intended to apply only to this general law as it then stood in the Revised Statutes; nor was there any such manifest intent on the part of the legislature to substitute the general provisions of the statute of 1866 for the special ones of the act of 1837, as would work a repeal of the latter by implication.

*Held*, further, that the commissioners of highways of a town have the power to assess a moneyed or stock corporation having property therein, for highway labor to be performed in a road district in such town other than that in which such property is situated.

*Delaware Special Term, September, 1882.*

THIS is an appeal from a judgment entered in Delaware county November 15, 1882, upon a trial before the court at

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special term, dismissing plaintiff's complaint on the merits, and for the recovery of seventy-four dollars and sixty-nine cents costs.

The action was brought to obtain a perpetual injunction restraining the defendants from levying a tax upon the plaintiff's property in the year 1882, to the amount of \$120, on account of the plaintiff's failure to work out or commute for eighty days of highway labor, assessed against it in the town of Hancock, and apportioned between road districts No. 16 and No. 41 in that town.

The plaintiffs are the owners of a large amount of real estate in the town of Hancock, consisting of twenty-one and one-half miles of double track, with depots and other appurtenances, which was assessed upon the roll of 1881 at \$333,000.

The total assessment upon their property in the town for highway labor in 1882 was 1,100 days; the total assessment of highway labor in the town for the same year, upon all property, was 3,116 days.

The plaintiff's road runs through only eight out of the sixty road districts of the town.

The highway commissioners apportioned the highway labor assessed upon plaintiff's property in 1882 among thirty road districts, besides those through which the railroad runs, allotting sixty days to district No. 16, and twenty days to district No. 41.

The plaintiff commuted for or worked out their highway tax in all the other districts, but refused to work out or commute for its highway tax in these two districts, upon the ground that the highway commissioners had no right to apportion their highway tax among districts other than those through which the road runs.

The overseers of the highways in these districts made the returns required by law to the supervisor of the plaintiff's unworked highway labor on or before October 1, 1882, and the supervisor laid their returns before the defendant's

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board at their annual meeting in November, 1882, which was about to include the amount of this highway labor at the rate of \$1.50 per day, in the tax levy of the town against the plaintiff and its property, and to make out a warrant for the collection thereof.

The plaintiff then brought this action for a perpetual injunction restraining the defendants from such action, and obtained a temporary injunction during the pendency of this action.

*L. E. Carr*, for plaintiff.

*Maynard & Gleason*, for defendant.

MARTIN, *J.*—The principal and substantially the only question involved in this case is, have the commissioners of highways of a town the power to assess a moneyed or stock corporation having property therein, for highway labor to be performed in a road district in such town other than that in which such property is situated? By the Revised Statutes as they stood prior to the year 1837, and as they remained until amended in 1876, it was provided that no person being a resident of the town shall be required to work on any highway other than in the district in which he resides, unless he shall elect to work in some district in which he may have land (2 *R. S.*, p. 1, chap. 16, title 1, sec. 32). Moneyed and stock corporations were not liable to assessment for highway labor under the Revised Statutes (*Bank of Ithaca agt. King*, 12 *Wend.*, 390), consequently the above provision was not applicable to moneyed or stock corporations.

While the law stood thus the legislature, in 1837, passed a statute providing that "in making the estimate and assessment of the residue of the highway labor to be performed in the town after assessing at least one day's work upon each male inhabitant \* \* \* the commissioners of highways shall include among the inhabitants of such town among whom such residue is to be apportioned, all moneyed or stock

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corporations which shall appear on the last assessment-roll of their town to have been assessed therein, \* \* \* *which labor shall be performed in such district or districts as the commissioners of highways of the town shall direct* \* \* \* every such corporation may commute for the highway labor assessed upon it in the same manner, and at the same rate as is allowed by law to individuals, or by paying such commutation to a commissioner of highways of the town, and the commutation money so paid may be expended by the commissioners of highways upon any district or districts in the town, and for that purpose the said commissioners shall be entitled to demand and receive from the overseer to whom any such commutation may have been paid, the whole, or any portion thereof" \* \* \* (*Chap. 431, Laws 1837*).

It was under and by virtue of this statute that the property of moneyed or stock corporations first became liable to assessment for highway labor. This was a special statute, authorizing the assessment of highway labor on a new and distinct class. It not only provides that a new class of property should be assessed, but also that the labor as assessed should be expended in a manner essentially new. This became necessary from the fact that these corporations were possessed of large amounts of property which was thus made subject to such tax, and which was usually located in a single, or at most, in but few districts of the town. The large amount of labor required to be performed by them could not be advantageously expended in the districts where such property was located. Therefore the legislature provided that the labor assessed to such corporations should be performed in such district or districts as the commissioners of highways should direct, conferring upon the commissioners the power to determine in what districts of such towns said labor should be performed.

If the statute of 1837 still remains operative and unrepealed, the commissioners of highways of the town of Hancock had an undoubted right to assess the plaintiff for, and require it

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to perform highway labor in any district in that town, whether it had property in that district or not. Does this statute still remain operative and unrepealed? The plaintiff insists not. It contends that it has been repealed. While it does not contend that this act has been expressly repealed, still, it insists that subsequent legislation upon this subject has impliedly repealed it. It contends that that result was effected by the passage of chapter 770 of the Laws of 1866, which was as follows: "From and after the passage of this act the highway tax upon any land or property \* \* \* shall be worked out or commuted for in the district in which said lands or property is situated, and if commuted for, the money shall be paid to the overseer of said district, but this act shall not apply to or affect any county, city, village, town or district where the disposition of the highway tax has been provided for by special enactment.

It must, I think, be admitted that the language of this statute is sufficiently broad and comprehensive to cover the case of a corporation, and that it would have limited the power of the commissioners of highways to assess such corporations for labor to be performed in the district or districts in which their property was situated, if there had been no special statute on the subject. But there was. When this act was passed, the statute of 1837 was still in force. This statute was a special one, applying only to corporations. The statute of 1866 was general. It may be well, before proceeding farther, to examine some of the authorities upon the question of the repeal of statutes by implication, and discover, if possible, what rules should govern us in determining this question.

A somewhat early case upon the question was the case of *Bowen agt. Lease* (5 *Hill*, 225), in which it was said, by NELSON, Ch. J., who delivered the opinion of the court in that case: "The invariable rule of construction in respect to the repealing of statutes by implication is, that the earlier act remains in force unless the two are manifestly inconsistent

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with each other, or unless in the latest act some express notice is taken of the former plainly indicating an intention to abrogate it. As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subjects, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together."

*In the Matter of Commissioners of Central Park* (50 N. Y., 497), the late judge ALLEN, in delivering the opinion of the court, said: "The law does not favor a repeal of statutes by implication. To work a repeal by implication the intent of the legislature must be very apparent, or the two laws must be so incongruous that effect cannot be given to both. \* \* \* A special and local statute, providing for a case or class of cases, is not partially repealed or amended as to some of its provisions by a statute general in its terms, provisions and application, unless the intention of the legislature to repeal or alter the particular law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it (*Caper v. Glover*, 4 Mass., 305).

In the case of the *People ex rel. agt. Palmer* (52 N. Y., 84), it was held that the repeal of statutes by implication is not favored by the law, and when a later and former statute can stand together, both will stand, unless the former is expressly repealed, or the legislative intent to repeal is very manifest."

In the case of the *People agt. Quig* (59 N. Y., 88) it was held "that repeal of statutes by implication is not favored, and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of

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an intent by the legislature to effect such repeal; and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end."

*In the Matter of Delaware and Hudson Canal Company* (69 N. Y., 212) it was said "a general law will not in the absence of a very evident intent on the part of the legislature to do so, and which intent must appear by the terms of the act itself, abrogate or change the provisions of a special law passed for particular cases constituting a class by themselves for which the general laws of the state do not profess to provide."

In *Heckmann agt. Pinkney* (81 N. Y., 215) it was said "it is the undoubted rule that repeals by implication are not favored. Where there is no repealing clause in a later statute, and that and a former one can stand together and both have effect, they will generally both be held to be in force. But where a later statute not purporting to amend a former one covers the whole subject, and was plainly intended to furnish the only law upon the subject, the former statute must be held repealed by necessary implication."

From these authorities the following rules may, I think, be safely deduced:

*First.* The repeals by implication are not to be favored, but, on the contrary, courts are bound to uphold the former statute if the two acts can stand together, unless it is expressly repealed, or the intent to repeal is very manifest.

*Second.* That to work a repeal by implication the intent of the legislature must be very apparent, or the two laws must be so incongruous and repugnant that effect cannot be given to both.

*Third.* That a special law providing for a case, or class of cases, is not to be regarded as partially repealed or amended by a general statute, unless the intention of the legislature to alter that particular law is very obvious.

*Fourth.* That when it is manifest that the legislature intended the latter statute as a substitute for the former, the

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latter may abrogate the former although not entirely repugnant to it.

Applying these rules to the statute under consideration, and it is very difficult to see how it can be held that the statute of 1866 effected a repeal of that of 1837, when we consider the condition of the law at the time of the passage of the act of 1866. At that time, by the general law as contained in the Revised Statutes, the property of individuals, firms, &c., was liable to assessment for highway labor, but under such general statute the property of a corporation was not liable. Corporations were only liable by virtue of the statute of 1837, which was a special statute imposing upon them this tax, and which contained provisions peculiarly adapted to the condition of such corporation and to the situation of their property. Here, then, were two distinct statutes in relation to the assessment of highway labor, one relating to a class only the other general. Was it the intent of the legislature that the general law of 1866 should apply only to the general law then in existence upon this subject, or was it intended to apply to this special law also? I think it was intended to apply only to the general law. I cannot think the legislature intended to repeal the act of 1837, so far as the same provides that the highway labor assessed upon the property of a corporation may be required to be performed in such district or districts as the commissioners of highways may direct, or that it was intended to provide that corporations should work out their necessarily large assessments within the narrow limits of a single road district, thus rendering their assessments practically, or at least partially, valueless to the town. Construing the statute of 1866 as applicable only to the general statute and it is in no way repugnant to or inconsistent with the statute of 1837; and thus construed effect is given to both.

I am therefore of the opinion that the statute of 1866 was not intended to repeal that of 1837, and that it was not intended as a substitute for it, or any part thereof, but that it was intended to apply only to the general law as it then stood

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in the Revised Statutes. There certainly was no such manifest intent on the part of the legislature to substitute the general provisions of the statute of 1866 for the special ones of the act of 1837 as would work a repeal of the latter by implication.

It is also contended by the plaintiff that chapter 348 of the Laws of 1876 have effected such repeal. I cannot think so. That act was simply an amendment of section 32 of chapter 16 of part 1 of the Revised Statutes; and as we have already seen that statute does not apply to corporations. It was in no way inconsistent with or repugnant to the special statute of 1837 relating to corporations.

From these considerations it follows that the plaintiff's complaint must be dismissed upon the merits.

NOTE. — Affirmed, May general term, 1883, on foregoing opinion (*See* 30 *Hun*, 222). Appeal to court of appeals discontinued March 18, 1884.

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## N. Y. COMMON PLEAS.

ROBERT E. MACNIFFIE, respondent, agt. BENJAMIN L. LUD-  
DINGTON, appellant.

*Appeal from judgment of district court — When common pleas will review evi-  
dence on a question of fact.*

Where there is conflicting evidence on a question of fact in the court below, this court will review the evidence and reverse the judgment appealed from, where it is clearly against the weight of evidence.

*General Term, December, 1883.*

*Before DALY, Ch. J., and VAN HOESEN, J.*

The plaintiff, as assignee from one James M. Lyddy of a claim against the defendant for professional services, recovered a judgment in one of the districts courts of the city of New York for ninety dollars, the full amount claimed, with costs.

There were but three witnesses sworn before the justice in

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the court below, to wit: Lyddy, the assignor of the claim who testified that he rendered the services at the request of the defendant, and that they were worth the amount claimed.

The defendant and his attorney, George W. Lord, testified that the services claimed for were rendered at the instance and request of Mr. Lord, and with the understanding that no charge therefore should be made against the defendant. The other facts sufficiently appear in the opinion of the court.

*William J. Groo*, for appellant.

*James M. Lyddy*, for respondent.

PER CURIAM. — This judgment should be reversed. Upon reviewing the evidence, the conclusion is unmistakable that the professional services of Lyddy, in the suit of *Nason agt. Luddington*, were voluntarily rendered by him at the request and for the benefit of Mr. Lord, the defendant's attorney, he being at the time confined to his house by illness, and not upon any retainer by the defendant. This is distinctly and positively sworn to both by Lord and by the defendant, whilst Lyddy's account of his retainer by the defendant and of the services he rendered is vague, indefinite and in part contradictory.

It is especially so in respect to his services upon the motion for the stay of proceedings. He first testified that he prepared the affidavit and other papers upon that motion, and when it afterwards appeared that that affidavit was in the defendant's hand-writing he admitted that the papers were prepared in the defendant's office; and so in respect to the visit to New Jersey. He first testified that he went to the defendant's office to inquire where the defendant's attorney, Lord, lived, and afterward that he did not see the defendant until he, Lyddy, had returned from New Jersey; and he could not remember whether he went there for the special purpose of the defendant's suit or not.

The case of the plaintiff rests solely upon Lyddy's testimony,

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and whilst it is of the character stated, the testimony in conflict with it of Lord and the defendant is supported by circumstances that are uncontradicted.

The defendant's statement that Lyddy told him that he was going to make the motion as a personal favor to Lord, and that he would make an affidavit that would be a protection to the defendant against any charge against him for services, and attach it to the motion papers, is corroborated by the affidavit itself, in which it is stated that Lyddy makes the motion at Lord's request. The defendant swore that Lyddy was an entire stranger to him; that he had already employed Lord and Mr. Choate, and being a lawyer that he would have made the motion himself if he had anything to pay for doing it. That Lyddy had a long conversation with the defendant, in which the whole of the case was talked over, and several consultations also with Nason's lawyer for the purpose of effecting a settlement by the defendant paying \$1,000 is improbable upon its face, for the defendant, at that time, had offered to pay three times that amount, or \$3,000, if the plaintiff would settle, and which was then a standing offer in the hands of his attorney, a fact that is sworn to by the defendant and not contradicted. A part of the services charged for are interviews and consultations on October twelfth, fifteenth and seventeenth. The defendant swore that he never had any consultations, except that Lyddy asked him about the case. "No consultations," he said, "except, how are you getting along, and how will you succeed?" and that this was all there was of the consultations was not denied by Lyddy, although he afterwards went upon the stand and gave further testimony. Finally, Lyddy allowed four years and a-half to go by without sending any bill to or apprising the defendant of any claim against him for these services, and when he did he claimed \$150, and when the suit was brought fixed the amount at ninety dollars, a difference of sixty dollars in so small a bill.

The judgment should be reversed.

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Stuyvesant agt. Neil.

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Appt. 1 fee

## SUPREME COURT.

ROBERT V. R. STUYVESANT agt. KATHARINE REID NEIL  
and others.

*Trust estate — Deed of trust — Power of trustee under.*

Where a wife is empowered by a deed of trust executed by herself and husband to apportion by will or other instrument, in writing, certain property among her children and their descendants, she cannot limit the trust estate to an estate for life in her children with remainder to their issue, but must apportion the property itself and all the rights incident to ownership.

*Special Term, December, 1883.*

*John N. Whiting, for plaintiff.*

*J. R. Cummings, for guardian ad litem.*

VAN VORST, J. — I cannot resist the conclusion that the appointment made by Julia Stuyvesant, through her last will, was a defective execution of the power with which she was invested by the deed of trust of the 27th day of February, 1847, executed by herself and husband to Jordan G. Ferguson. By that deed it was provided that the trustee should convey the premises and the accumulations, and the securities or property which may have been substituted for any portion thereof, [“to such of the children of the said Julia Stuyvesant by her present husband and their descendants, in such proportion and subject to such provisions for her present husband as she, by will or other instrument in writing, should direct and appoint.”] And afterwards in the deed Julia Stuyvesant was expressly authorized “to appoint and direct, by will or other instrument in writing, the apportionment” of the property and its accumulations “among her children by her present husband and their descendants.”

By her will Mrs. Stuyvesant seeks to limit the estate

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to an estate for life in her daughters, with remainder to their issue. This clearly was not intended by the deed or the settlers of the trust estate. The property itself, and all the rights incident to ownership, and not a mere right to its use for a time, was to be apportioned by Julia Stuyvesant among her children and their descendants.

If one of her daughters was dead, with issue surviving, Mrs. Stuyvesant could have doubtless given a portion of the settled estate to the child or other descendant of said deceased daughter. In general, the objects of the trust from which the trustee has the power of selection are vested with the beneficial interest, to be divested out of those who are not selected.

The power of the trustee was to select the objects out of the class named, and apportion the property itself, not a limited interest therein.

That such was the original intention of the parties to the deed is made clear by the provisions contained therein, that in the event of the death of Julia Stuyvesant without leaving a will, the property was ultimately "to be divided equally among the children of the said Julia Stuyvesant who may then be living, and their descendants, if any shall have died leaving lawful issue" (*Perry on Trusts*, secs. 249-251, 508). The power must be strictly adhered to in its execution.

Taking into consideration the other provisions of her will looking towards the absolute equality of interest of her several children, the will may be regarded as an execution of the power to the extent of determining that her children and the issue of her deceased child must take share and share alike, and it must now be determined that the children of Mrs. Stuyvesant who are now living, and Julia S. Winterhoff, the daughter of Mrs. Stuyvesant's deceased daughter, shall severally take an equal proportion of the trust estate. The accumulations of the trust estate pass with the estate itself. And to the extent that the house and lot No. 53 West Thirty-eighth street was paid for with the assets of trust property, it

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Vernon *et al.* agt. Palmer.

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must be regarded as forming a part of the trust estate, notwithstanding the title thereto was taken in the name of Mrs. Stuyvesant.

The evidence does not make it entirely clear that all the money paid by Mrs. Stuyvesant on the purchase of this property, or that the sum of \$5,000 on deposit in the trust company, were accumulations of income. It is stated in the plaintiff's brief that they are presumptively such accumulations. But the evidence should be reasonably satisfactory on this point, especially as infants are concerned. A reference will be needed to take the proof upon that subject.

Findings of fact and conclusions of law must be prepared by the attorneys of the plaintiff to carry out what has been above indicated, which will be settled on notice.

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### COURT OF APPEALS.

THOMAS VERNON *et al.*, respondents, agt. ALBERT PALMER,  
appellant.

*Code of Civil Procedure, section 1318 — Effect of an appeal taken before the judgment of reversal is entered.*

Although the Code provides that an appeal must be taken from the order denying a new trial, an appeal taken before the judgment of reversal is entered is ineffectual to review the judgment.

THIS action was brought against the defendant to recover from him a corporate debt, as a penalty under section 12 of the Laws of 1848. At the close of the plaintiff's case the defendant moved to dismiss the complainant's case, which motion was granted, and a judgment entered thereon. An appeal was thereupon taken by the plaintiff to the general term, and the order and judgment appealed from were reversed and a new trial ordered. Plaintiff thereupon entered

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an order of the general term and served the same upon the defendant, who appealed to the court of appeals from the order in July, 1882. In February, 1884, before the case had been heard at the court of appeals, the defendant moved, at special term in the superior court, that the plaintiff be compelled to enter a final judgment, which motion the court granted, and thereupon the plaintiff entered final judgment and served the same upon the defendant.

The appellant then moved, in the court of appeals, for leave to withdraw the appeal, on the ground that the appeal was a nullity, no final judgment having been entered when the appeal was taken from the order of reversal.

*James B. Dill* (*Dill & Chandler*, attorneys), for the motion. The order of the general term was not a judgment and was not effectual to reverse a judgment entered on the decision of the court at trial term (*Knapp agt. Roche*, 82 *N. Y.*, 366). The Code provides by implication that a judgment of reversal must first be entered before an appeal can lie from an order granting a new trial (*Code*, sec. 1318).

*Franklin A. Paddock* (*Paddock & Cannon*, attorneys), opposing. Section 1318 of the Code has changed the former practice, namely, that an appeal must be taken from the judgment of the general term, and this appeal reviewed the order granting a new trial, and the only effect of this provision is to shorten the time in which an appeal must be taken (*Throop's note on section 1318*).

THE COURT granted the defendant's motion, holding: Although the Code provides that an appeal must be taken from the order of reversal, it did not dispense with the necessity of entering a judgment on the decision of the general term; that an appeal from the order of the general term reversing a judgment and granting a new trial is not effectual to review the judgment, unless a judgment of the general term has been entered and made a part of the case;

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that the provision of the Code is that upon an appeal from an order granting a new trial, the judgment of reversal *must* be reviewed, and thus by implication provides that the judgment shall first be entered before an appeal can effectually be taken from an order of reversal.

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## SUPREME COURT.

FLORENCE M. DE MELI agt. HENRY A. DE MELI.

*Code of Civil Procedure, sections 1762, 1763, 1769, 8280—Action for separation by husband or wife—For what causes may be maintained—Cruel and inhuman treatment which will authorize a separation—What constitutes a person a resident of this state—Expenses of action and costs, how awarded.*

The residence of a man is changed from one place to another only by an abandonment of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention to permanently settle in that place.

Where it appeared from defendant's own testimony that, during all the time of his sojourn in Dresden, whenever he has had occasion to state his residence he has described himself as a resident of the city of New York; that he has every year paid the stranger's tax in the city of Dresden; that all the property he expects to inherit is situated in the city of New York:

*Held*, that from his own evidence he has never had any intention of obtaining a residence anywhere else than in the city of his birth, and was consequently a resident of the state of New York at the time of the commencement of this action.

Cruel and inhuman treatment which will authorize a separation, or which will permit a wife to say that it is unsafe or improper for her to cohabit with her husband, must be either actual personal violence, committed with danger to life, limb or health, or there must be a reasonable apprehension of personal violence, arising from menaces or threats creating a reasonable fear of bodily harm; mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty.

While the treatment of the plaintiff by the defendant was frequently unkind, while he frequently indulged in fits of passion and used violent language, and by his conduct, supervision and attempts to control her

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every action, made himself, at times, very disagreeable to her, and frequently caused her great unhappiness; while he was severe, harsh and even ungentlemanly, yet his conduct was not such as to create any apprehension of personal violence, or to cause injury to the health of the plaintiff, and for that reason she is not entitled to a decree for a separation. That defendant made an unfounded charge of adultery against plaintiff while she was living separate from him, and which only came to her notice indirectly, is not such an act of cruelty as to warrant a separation. Nor does the making of a charge of adultery, even to one's wife, constitute cruelty, unless such charge be made in bad faith, and without any ground for believing it to be true.

Where in an action brought by the wife against her husband to obtain a separation from him, and he sets up a counter-claim and alleges that his wife was guilty of adultery, and such allegation was made as a foundation for a claim for a demand for affirmative relief, and not simply as a defense to plaintiff's action:

*Held*, that this was tantamount to the commencement of an action by him against his wife for divorce on the ground of adultery, and as to that counter-claim she has the same right as though she were defendant in an action brought against her for an absolute divorce, and although her complaint be dismissed, yet where she succeeds in refuting the charge of adultery, she is entitled to an allowance for her counsel fees and expenses of preparing for trial *pendente lite*.

*Special Term, April, 1884.*

*John E. Parsons*, for plaintiff.

*H. B. Turner* and *David McClure*, for defendant.

RUMSEY, J. — The plaintiff brings this action under section 1762 of the Code of Civil Procedure, to obtain a separation from the defendant.

The first answer of the defendant attacks the jurisdiction of the court; and he claims that, under the facts as they appear, he was not, at the time of the commencement of the action, a resident of the state of New York, as required by section 1763, subdivision 1, and that for that reason the court has not obtained jurisdiction. From evidence in the case, it appears that the defendant was born in the city of New York, in the year 1842; that his father was a naturalized

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citizen of the United States; that he was educated at the School of Mines, in Columbia College; and that, after he had finished the course at that school, he went to Dresden with his father and mother, where, except for some months, when he has been in the United States or in South Africa, he has since staid. It appears from his own testimony that during all the time of his sojourn in Dresden, whenever he has had occasion to state his residence, he has described himself as a resident of the city of New York; that he has every year paid the stranger's tax in the city of Dresden; that all the property he expects to inherit is situated in the city of New York; and it is quite clear, I think, from his own evidence, that he has never had any intention of obtaining a residence anywhere else than in the city of his birth; such being the case, he has never acquired a residence away from this state, because the residence of a man is changed from one place to another only by an abandonment of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention to permanently settle in that place (*Frost* agt. *Brisbin*, 19 *Wend.*, 11; *Lowry* agt. *Bradley*, 39 *Am. Dec.* 142; *Dupuy* agt. *Wurtz*, 53 *N. Y.*, 556, 561).

It is conceded that the plaintiff was, at the time of the commencement of the action, a resident of this state, and I am quite clear, therefore, that she has brought herself within subdivision 1 of section 1763 of the Code, and that the court has jurisdiction of the action.

The plaintiff claims that she is entitled to a separation, because, as she says, for a long series of years the defendant has been guilty of cruel and inhuman treatment of her, and has conducted himself in such a manner as to render it unsafe and improper for her to cohabit with him as his wife. It appears from the evidence that the parties were married at Dresden, on the 1st day of March, 1870; that soon after their marriage they came to this country and went to Georgetown, in the state of Colorado, where they resided for some months,

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and then, at the request of the plaintiff, they left Georgetown and returned to Europe, that the plaintiff might be near her mother at the time of the birth of her first child, which took place in the latter part of October, 1870. The plaintiff, upon her examination, stated several instances of unkind and ungentlemanly treatment, which she claimed to have received from the defendant while they were in New York on their way to Georgetown, and while they were living in Georgetown. It is unnecessary to refer particularly to those incidents. They were not pleasant, it is true, and it is just as true that, if the plaintiff's version of them is correct, the defendant did not treat her with the kindness with which a husband should treat his wife. Of themselves they have little importance; whatever importance they do have, is derived simply from the fact that they are *indicia*, which enables us to get an idea of the manner of man the defendant was, and his notions of how a wife ought to be treated.

The plaintiff's charges against her husband are, in the first place, that he gave way to terrifying outbursts of temper towards her, which were aggravated by his becoming addicted to excessive indulgence in strong drink, from which he would become greatly excited. I do not think the evidence shows that the defendant was at any time addicted to excessive indulgence in strong drink; so far as the plaintiff's case depends upon that, it is entirely disproved by the evidence. That he did give way to outbursts of temper, and that he was, when about his house, harsh, and at times severe in his treatment of the plaintiff, is not to be denied. From the time he left Georgetown, it appears by the evidence that he was wholly without employment, except during the few months which he spent in South Africa. A large portion of his time was spent in his apartments, and he seemed to be a man who had his own ideas of how his house should be managed, which were frequently different from the ideas of his wife on that subject; and it appears that he very frequently interfered with the servants and with his wife's management of the

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household affairs, and with his wife's disposition of her own time, and that he required her to conform strictly to his notions in regard to all her household matters, and to obey implicitly every wish that he expressed. I am inclined to think, from the evidence, that his behavior in his family was properly characterized by one of the witnesses as "petty tyranny," and I have no doubt that there were times during the married life of these people when this behavior was the cause of great unhappiness to the plaintiff. But the evidence does not show that his outbursts of temper were accompanied by any personal violence towards the plaintiff, or that she had any apprehension or fear of receiving personal violence at his hands. In fact, she says explicitly, in her testimony, both on her direct and on her cross-examination, that she never had any "apprehension or alarm" of personal violence at his hands, until six weeks before she left Dresden; and there does not appear anywhere in the case any action on his part, either an outburst of ill-temper or even a quarrel with his wife, during that period of six weeks before the plaintiff left Dresden, which could possibly have given rise to any apprehension or alarm. In fact, the whole case, from beginning to end, is wonderfully barren of any treatment on the part of the defendant toward the plaintiff which could give rise to any such apprehension. Some of the witnesses say that his behavior was brutal; the plaintiff says that certain acts of which she complains were cruel, but they fail to specify any acts which may be legally characterized as cruel or brutal. The plaintiff complains of the treatment of her parents by the defendant, and I think it is fair to say, from the evidence, that the defendant was not at all times inclined to be upon friendly terms with them; but there appears in evidence only one case when, even upon plaintiff's own testimony, the defendant was guilty of anything which could properly be called gross abuse of her parents, or outrageous behavior toward them. The explanation which he gives of the refusal to admit Mr. Draper to the house at the time when his wife

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was lying ill, was not contradicted, and it seems to me that it is correct, and it was reasonable. I think that the version of the plaintiff as to the treatment of her parents is somewhat exaggerated in her testimony, but I am sure that it is quite clear, from the evidence, that the defendant did not have any friendly feeling toward Mrs. Draper, and that he prevented, as far as possible, any intercourse between her and her daughter. He gave the reasons which led him to this course during the time Mrs. Draper was at Freibourg. I was not much struck with their force, and the impression which the evidence left upon my mind as to the treatment of Mrs. Draper, was that the defendant treated her unkindly and in an ungentlemanly manner; and this, I have no doubt, was the cause of very considerable unhappiness to the plaintiff.

The plaintiff complains, further, that the defendant treated with great severity and harshness their boy, a child of about six years; that he used to punish him unmercifully for slight causes, and that at one time when she endeavored to stand between him and the child she received upon her person the blows which were intended for the child; and she says that this punishment of the child was asserted by the defendant to have been inflicted for the purpose of hurting her feelings, because it was the most convenient way for him to make her uncomfortable and to treat her cruelly. The plaintiff says that this course of treatment of the child commenced when the child was of the age of six years, and continued down to the time when she left the defendant's house. There is other evidence in the case tending to show that the defendant was in the habit of punishing the child quite severely, and there is the evidence of Minna Moehring that at one time, when she was passing along the corridor, she saw the defendant strike the boy with a book and with his fists, and knock him down. I do not think, however, that the allegations and assertions of the plaintiff are borne out by the evidence in the case. She herself stated that when the boy needed punishment she very frequently took him to the defendant to be punished, and

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stood by while the punishment was being inflicted ; and that, it seems to me, is quite inconsistent with her statement that the defendant was in the habit of punishing the child severely for no other purpose than to inflict pain upon the mother.

I cannot conceive it to be possible that a mother, knowing that her husband was in the habit of wantonly inflicting severe beatings upon her child, would take the child to the father and request him to punish it. Especially is this so when she knows that the beatings are inflicted for the express purpose of hurting her feelings.

It does not appear that the act which is related by the witness Moehring ever came to the notice of the plaintiff, and the story she tells is entirely without any statement of the circumstances, and I do not feel at liberty to attach much weight to it. I have no doubt that the defendant did punish the child, and punished him severely, at times, but the evidence does not show that such punishment was more severe than the good of the child required, and it entirely fails to show, in my judgment, that it was inflicted at any time for the purpose of giving pain to the mother.

The plaintiff also complains of the conduct of the defendant's mother toward her. I do not see that that has any importance in this case. They never lived in the same apartments or in the same house, or even in the same street. It does not appear that the defendant compelled his wife to be in the company of the elder Mrs. de Meli when she was not inclined to do so, except that he desired her to go with the rest of the family to his mother's to dinner on Sunday afternoons, and it does not appear that she expressed any serious disinclination to do so, or that she was compelled to do so when she felt inclined to refuse. It may be quite true that there was, on the 1st of October, 1881, a serious quarrel between the plaintiff and the elder Mrs. de Meli ; and it is very possible that the defendant was inclined to take his mother's part ; but I do not see that, upon the testimony of the plaintiff herself, the defendant took any active part in the quarrel or inter-

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ferred in it in any way ; but she herself says that after that time, when she refused to go to the house of the elder Mrs. de Meli to dinner, because of the treatment she had received from her, the defendant interposed no objection to her staying away, and she did stay away.

As to the purpose of the defendant to place the plaintiff in a lunatic asylum, or a "*maison de sante*," I think the evidence of Dr. Zumpe is quite conclusive to the effect that no such suggestion was ever made to him, and I do not think that the defendant ever had any intention of taking any such step, although the conversation which was had between the plaintiff and the defendant in regard to Mrs. Von Weber may have given her the idea that he had such an intention ; and that is the more likely from the fact that at that time the plaintiff was not at all well, and was still suffering from the fatigue of moving and the nervous excitement caused by her quarrel with the elder Mrs. de Meli.

I have thus gone over substantially all the charges upon which the plaintiff claims that she is entitled to a separation, except the charge of adultery, which I will consider later.

The right of a court to grant a separation is based entirely upon the statute, and unless the plaintiff brings herself, by a fair preponderance of the evidence, within the statute as it has been interpreted by the courts, she can have no separation, however unpleasant her relation with her husband may have been, or however unhappy a life has come to her from those relations. The interpretation of this statute is not -- in this state, at least -- an open question. It is thoroughly well settled that cruel and inhuman treatment which will authorize a separation, or which will permit a wife to say that it is unsafe or improper for her to cohabit with her husband, must be either actual personal violence, committed with danger to life, limb or health, or there must be a reasonable apprehension of personal violence, arising from menaces or threats creating a reasonable fear of bodily harm ; and the mere austerity of temper, petulance of manners, rudeness of language, even

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occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty (*Mason* agt. *Mason*, 1 *Ed. Ch. R.*, 278, 292; *Bishop on Marriage and Div.* [4th ed.], sec. 717, et seq., and notes; *Kennedy* agt. *Kennedy*, 73 *N. Y.*, 369, 374).

As is said by lord SEWELL, in the case of *Evans* agt. *Evans* (1 *Hag.*, 35): "These things are high moral offenses in the marriage state, undoubtedly — not innocent, surely, in any state of life — but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties — for it may exist on one side as well as on the other — the suffering party must bear in some degree the consequences of an injudicious connection — must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered and much misery be produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous, and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove."

The plaintiff here, as we have seen, charges no personal violence, and it appears that she never had any apprehension of personal violence at the hands of the defendant. Admitting this, she claims that she is entitled to this separation because the conduct of the defendant was such as seriously and injuriously to affect her health, and therefore rendered it unsafe and improper for her to cohabit with him. To sustain her claim that such conduct entitles the injured party to a separation, she cites the case of *Kelly* agt. *Kelly* (*L. R.*, 2 *P. & D.*, 31, 59). It appeared in that case that the respondent adopted a deliberate system of conduct to his wife, with a view of bending her to his authority; he entirely deposed her from her natural position as mistress of her husband's house;

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she was debarred the use of money, the household expenses were withdrawn from her control, and she was not permitted to spend any money for her own necessary expenses; every trifle that she required had to be put down on paper, and her husband provided it if he thought proper; having, on one occasion, declined to tell her husband, on her return from town, every house to which she had been, an interdict was placed on her going out at will; at one time the doors were locked to keep her in; at another time a man servant was deputed to follow her; and at another time the respondent himself insisted on going with her wherever she wanted to go. On all occasions he occupied the short time they were together in applying to her strong, coarse and abusive epithets, "and language that would be applicable to a woman who had been guilty of adultery." He passed no time in her society; he took no meals with her, and whenever he spoke to her it was only to reproach her. Save on two occasions she was not permitted to see anybody. She was prohibited from writing letters to any friend, unless her husband saw them. And the effect of this treatment, as found by the court, was that her health was so broken down that to continue subject to the same treatment for any length of time, would not only have seriously imperiled her life, but would have exposed her to the highly probable consequence of paralysis or madness. Upon that state of facts the court of probate and divorce held: "If force, whether physical or moral, is systematically exerted to compel the submission of a wife in such a manner, to such a degree and during such a length of time as to injure her health and to render a serious malady imminent, it is legal cruelty, and she will be entitled to a judicial separation."

The case was a very strong one, and it is perfectly clear, as the court found, that the treatment complained of had already broken plaintiff's health, and that a longer continuance of it would produce irreparable injury. The facts brought that case within the rule laid down in *Kennedy* agt. *Kennedy* (*supra*), for the wife was actually locked in and deprived of

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her liberty. But it need not to be put upon the ground that the husband used actual physical violence to the wife. It was enough that the treatment of the wife was such as to break down her health. But between the cases at bar and that of *Kelly* agt. *Kelly*, there is a vast difference. It arises from the fact that it is apparent upon the plaintiff's own case. In delivering the opinion in *Kelly* agt. *Kelly*, the judge ordinary, lord PENZANCE, says: "It behooves the court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife's danger is clearly reached, and on reliable evidence," and the whole gist of the decision is that it was admitted that the conduct of the respondent was such as to be attended with serious injury to the health of his wife. Now, in the case at bar, there is no evidence that the conduct of the defendant toward his wife was attended with any injury whatever to the health of the plaintiff. Indeed, it does not appear that she was at all out of health down to April, 1881. No doctor testifies to it. Not one of her witnesses suggests it, although several of them speak of his ill treatment of her, and that she was in tears.

During all her married life, and down to the time when the defendant returned from South Africa, she was able to attend to her household duties and to the social duties required by her position, and not one of her friends, who were examined as witnesses in her behalf, testifies to any failure of her health, for any reason whatever, during all those years, until the admitted failure of her health in the summer of 1881.

She herself testifies, upon her direct examination, that at the time the defendant left for South Africa, in September, 1880, her health was "perfectly good — perfectly well," so far as she could remember. Although she finally says she was somewhat unstrung at the time he left, such facts surely do not establish an injury to health to require a separation. It is true that her health failed to some extent after his return from South Africa, but there is nothing in the case to show

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that such failure should be attributed to the conduct of the defendant toward her.

The plaintiff says there was no other cause for that failure than his violent treatment of herself and children. But I have searched the evidence in vain for the facts to warrant that conclusion. Ill treatment of the kind claimed, so violent and persistent as to break down plaintiff's health between April and June (when it began to be suggested that her health required her to go to Frazensbad), would surely have been noticed by others, and would have been accompanied by some act or word which would have burned itself into the memory so that she could relate it. But there is nothing of the kind; the case stands upon her declaration that there was no other cause for her illness than his violent treatment; she specifies no act, she relates no incident, she says "there was nothing unusual;" "it was violent and it completely unnerved me again; I was very miserable." This will not do. Sympathy for a suffering woman must not blind us to the requirements of the law that "the conclusion of the wife's danger shall be clearly reached and on reliable evidence." The plaintiff's mere opinion will not support such a conclusion, and I could not be justified in finding as a fact that the conduct of the defendant towards the plaintiff was attended with injury to her health.

I have thus far assumed that the conduct of the defendant was substantially as claimed on the part of the plaintiff, and that her life was constantly unhappy by reason of his treatment. It is only fair to say that upon the evidence of her own letters, it is not entirely clear that she has not considerably exaggerated the unhappiness which she felt. These letters, from the beginning to the end of them, whether written to her husband or to other people, were all written after the commencement of this treatment towards her which has been characterized as "petty tyranny;" but they show a warmth of affection which it seems to me it would be impossible for her to entertain if the conduct of the defendant

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toward her had been uniformly such as she now states that it has been, and especially is that true of the letters written to him during his absence in South Africa.

The conclusion which I have reached, upon the evidence, as to the treatment of the plaintiff by the defendant during the years in which they lived together, is that while it was frequently unkind, while he frequently indulged in fits of passion and used violent language, and by his constant supervision and attempts to control her every action, made himself at times very disagreeable to her, and frequently caused her great unhappiness; while he was severe, harsh and even ungentlemanly, yet his conduct was not such as to create any apprehension of personal violence or to cause injury to the health of the plaintiff, and for that reason she is not entitled to a decree for a separation.

In addition to the reasons for a separation, given in the former part of this decision, the plaintiff insists that she is entitled to such a decree, because the defendant, after she left him in October, 1881, made an unfounded charge of adultery against her. There is no claim that any such charge was ever made or suggested during the time the parties lived together as man and wife. It appears from the evidence that whatever charge of that nature was made, was made by de Meli in regard to his wife after she had ceased to live with him, and after certain information had come to him from Mrs. Von Geyso, and from his little daughter. This charge of adultery was not only made by the defendant against the plaintiff, but he insists upon it in this action, and attempts to prove it, and he bases upon it a claim that he should have an absolute divorce from his wife. It has come to be a settled doctrine in this state that a false and malicious charge of adultery, made by a man to his wife, in her presence, may be such an act of cruelty as to entitle her to a separation (*Whispell* agt. *Whispell*, 4 *Barb.*, 217; *Kennedy* agt. *Kennedy*, 73 *N. Y.*, 369). But the principle upon which this doctrine is based is that such a charge, if it be false and malicious, made to a

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virtuous woman, inflicts such an injury upon her feelings as would warrant her in refusing to live with any man who would be guilty of it. The cruelty consists in the injury to the feelings caused by the false and malicious charge made to the person of whom it is spoken. I have found no case in which it has been held that such a charge, made of a woman while she was living separate from her husband, and which only came to her notice indirectly, was a sufficient act of cruelty to warrant a separation, and I am not prepared to accede to that proposition, but, however this may be, the making of a charge of adultery, even to one's wife, does not constitute cruelty, unless such charge be made in bad faith, and without any ground for believing it to be true. As is said by judge CHURCH in *Kennedy* agt. *Kennedy* (*supra*), "if a husband has reason to suspect his wife of infidelity, it is neither cruel nor inhuman to charge her with it."

Considerable evidence was given in this action which the defendant claimed tended to show that the plaintiff was guilty of adultery with Baron Von Geyso and, unexplained and uncontradicted, it seems to me that such evidence was such as, to say the least, warranted a reasonable man in thinking that the charge might have been true, and warranted him in doing what he did do, which was to consult his own friends and the friends of his wife with regard to the matter, and to ask them what it was best to do in the premises. Upon the evidence, it would be absurd to say that there was nothing to sustain the charges of adultery; and I do not think it can be said, under the circumstances, that they were made either maliciously or in bad faith. But upon the whole case it is very clear to me that the charges were not sustained, and that the plaintiff was not guilty of the adultery which was alleged against her.

The defendant insists that when the plaintiff went away on the 12th of October, 1881, she abandoned him, and that, therefore, he is entitled to a separation. I think his own evidence shows that there was an understanding between

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them that the plaintiff might go away upon giving him two days' notice. He swears that that was said, and Mrs. de Meli, in her letter of the twelfth of October, in which she notifies him of her departure, apologizes to him for not giving him notice, which it is said he was to have. As he consented to her departure, I do not think he is in a condition to complain of it now.

The plaintiff insists that it is evident that she cannot again live with her husband, and, as a separation is inevitable, the court should award it.

The reasons for which a limited divorce may be granted are found in the statute (*Code Civil Pro*, sec. 1762). Unless the plaintiff establishes one of the grounds specified in that section she can have no relief; that the parties cannot live together is not one of those reasons (*Davis agt. Davis*, 1 *Hun*, 444).

These considerations dispose of all the claims made by the respective parties, and lead to a dismissal of the complaint. I have been very much puzzled with the question of costs. Ordinarily, there is no doubt of the rule that a party who fails in this action is chargeable with costs; and if the only question in this case was whether Mrs. de Meli was entitled to separation, I should have no hesitation in dismissing the complaint without costs, which, of course, would not be granted against the wife here; but that is not all the questions litigated between these parties. As the Code now stands the defendant might, if he saw fit, set up a counter-claim in which he might allege any cause for a divorce or separation which is given by the Code and insist upon affirmative relief.

This was tantamount to the commencement of an action by him against his wife for divorce on the ground of adultery, as to that counter-claim she has the same right as though she were defendant in an action brought against her for an absolute divorce; that she is entitled to an allowance for her counsel fees, expenses of preparing for trial *pendente lite*. If she had finally succeeded in an action for an absolute divorce

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brought against her, her right to costs would have been unquestionable.

In this case the defendant saw fit to allege that his wife was guilty of adultery, and that was a serious question which was tried in the case, to which by far the larger portion of the testimony of the defendant was directed. This allegation was made as a foundation for a claim for a demand for affirmative relief, and not simply as a defense to plaintiff's action, as it might have been. It was by all odds the most important question litigated in the case; and the great portion of the expenses of the trial of the case on the part of the plaintiff has arisen from the necessity she was under of meeting and rebutting this charge of adultery. While, therefore, her complaint has been dismissed, she has not entirely failed in her action; on the contrary, she has succeeded in by far the more important issue which was presented.

Had an application for an allowance for expenses to meet this charge been made by the plaintiff before trial, I cannot doubt it would have been granted as though she were defendant in such action. As she has succeeded in that part of her litigation, I think she should still be treated as though she were defendant. The Code (*sec.* 1769) especially allows the court in such cases to award costs in its discretion to either party, and the rule in this, as in all other equitable actions, is to give costs as equity requires.

I think that this woman, who has been called upon here to defend her honor, and has done it, should be put in the same situation, so far as the issue is concerned, as though she had been defendant in an action in which that were the sole question tried and had succeeded.

For these reasons I am inclined, in the discretion which is given to the court by sections 1769 and 3230 of the Code, to give to the plaintiff such costs as will repay her as far as possible for additional expense to which she has been put, by reason of the necessity of preparing to meet the charge of adultery, which has been made against her. I do this the

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more willingly because it appears that no allowance has been made to her for alimony or counsel fees during the pendency of the action. I think the taxable costs of the action and an allowance of \$500 for counsel fees would be sufficient to repay her for the additional expense of preparing to meet the charge of adultery, and that amount, I think, should be allowed to her.

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### N. Y. COMMON PLEAS.

JOHN A. DINKEL agt. HENRY WEHLE.

*Disregarding undertaking on appeal—Mistakes in undertaking—Stay of execution—Remedies.*

Where the undertaking describes a judgment by giving a different date from the date of its entry, it describes a judgment which does not exist, and the respondent need not first move to set it aside, but he can disregard it and issue execution as if no undertaking had been given.

*Special Term, May, 1881.*

THE plaintiff obtained a judgment against the defendant for referee's fees for \$119.49, entered March 12, 1881. The defendant's undertaking on appeal to stay execution on this judgment described it as entered March eleventh; a similar date was in the notice of appeal.

The plaintiff claimed there was no stay, and issued execution to the sheriff, who made a levy on defendant's property. The defendant moved to set aside the execution and for restitution of his property.

*Henry Wehle*, for the motion. The proper practice is not to disregard the undertaking, but to move to set it aside (*Parfitt agt. Warner*, 13 Abb., 471).

*George F. Langbein*, for plaintiff, opposed. The judgment entered has never been appealed from, nor has any undertak-

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ing upon it ever been given. No such judgment as appealed from exists. The sureties named in the undertaking given could not be held liable on the judgment which, in fact, exists; they never bound themselves to pay that judgment. There was, therefore, no stay. The undertaking required by the Code of Civil Procedure is an undertaking "in the action from the judgment entered" (*See secs. 3213, 3046*). A surety is not held beyond the precise terms of his contract (*Walsh agt. Bailie, 10 Johns., 180; Pennoyer agt. Watson, 16 Johns., 100*). The contracts of sureties are to be construed by the courts strictly in their favor (*Rochester City Bank agt. Elwood, 21 N. Y., 88; see, also, Saily agt. Elmore, 2 Paige, 497; Supervisors of Albany agt. Dorr, 1 Denio, 268*). An undertaking upon an appeal which is insufficient in amount, will not stay the proceedings of the successful party (*Sternhaus agt. Schmidt, 5 Abb., 66*).

J. F. DALY, J.— In *Parfitt agt. Warner* (13 *Abb.*, 476) the supreme court held that where an undertaking on appeal was defective, but not void, the proper course was for the respondent to move to set it aside, but not to disregard it, and proceed to enforce his judgment. The action was for a foreclosure of a mortgage, and the plaintiff was secured by the mortgaged property. This is an important consideration. In ordinary actions for the recovery of money the defendant may gain time to dispose of his property by putting in an undertaking which affords no security. While plaintiff was making his motion to set aside the worthless instrument, his security in the judgment debtor's property might be gone. In *Sternhaus agt. Schmidt* (5 *Abb.*, 66) this court at special term held that an undertaking which did not comply with the Code effected no stay.

The undertaking and notice of appeal in this case by wrongly describing the judgment, failed to comply with the Code. The proper description of the judgment is the most essential part of the notice. The sureties might not be liable

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upon an undertaking reciting an appeal from a judgment which did not exist, as described in the instrument. At all events, they had a point on which to dispute their liability until determined by the court of last resort. The appellant, in tendering such an undertaking, offered respondent instead of security a lawsuit. It is hardly proper under such circumstances to hold respondent to the obligation to respect the attempt to stay his proceedings and to assume the burden of moving to set the defective undertaking aside. He is at least entitled to secure himself if the appellant does not secure him by a proper undertaking.

These general observations apply to all cases of this kind. There is no fear of the respondent's security being affected by delay in this case, and there can be no question that the defect in the undertaking here was the result of misinformation. While I cannot grant the motion to set aside the execution, it may not be out of place to say that an amendment would be allowed of course, and without terms.

Motion denied, with ten dollars costs to defendant to abide event of appeal.

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## SUPREME COURT.

WILLIAM J. HUTCHINSON agt. FREDERICK N. LAWRENCE,  
president of the New York Stock Exchange.

*Stock exchange membership — Proceedings for expulsion — Rights of member — Courts authorized to interfere for the purpose of seeing that the rules of such association are fairly and honestly administered.*

In every proceeding before a club, society or association, having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge and to be fully and fairly heard. The plaintiff, a member of the New York Stock Exchange, an incorporated voluntary association, having been charged by a special committee of investigation, after taking voluminous testimony, with being guilty of improper practices, the governing committee of the exchange, who are empowered by its constitution to expel members adjudged to have

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been guilty of obvious fraud, preferred charges against him based upon the testimony thus taken. He was permitted to make statements and explanations before the investigating committee, and to cross-examine the witnesses produced. Then he appeared before the governing committee and read his defense at great length. At a subsequent meeting on June sixth, in his absence, two accusing witnesses were examined by the governing committee, who then negatived a proposition that these witnesses be brought again before them to be cross-examined by the accused member:

*Held, first*, that though the governing committee is not bound on the trial of a member for misconduct by the ordinary rules which obtain in judicial proceedings, yet the court should interfere for the purpose of holding the association to a fair and honest administration of its rules. *Second*. The action of the governing committee on June sixth was not just or fair to the accused member in either a legal or equitable sense, and defendants should be restrained pending the action from asserting against plaintiff the resolution of expulsion passed upon him.

*N. Y. Chambers, March, 1884.*

*Joseph H. Choate and Robert Sewell, for plaintiff.*

*James C. Carter, Stephen P. Nash and Julien T. Davies, for defendants.*

LAWRENCE, J. — It was held by the general term of the court of common pleas, in the case of *White agt. Brownell* (2 *Daly*, 329), that as the privilege of membership of a voluntary unincorporated association is not conferred by the sovereign power, but is created solely by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore to membership one who has been expelled for non-compliance with the conditions upon which membership is made to depend; that the members of such an association are bound by its rules, when not in conflict with the law of the land, and that the courts can interfere no further than to hold the association to a fair and honest administration of those rules; also that, therefore, to warrant the granting of an injunction to restrain the officers of a voluntary unincorporated association from carrying

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into effect a resolution or vote suspending a member from the privileges of the association it must appear that the suspension was in violation of the constitution, rules or by-laws, for unless they were violated by the proceedings against him he could have no ground of complaint. It was also held by the special term of this court, in the case of *Olery agt. Brown* (51 *How. Pr.*, 92), that where there is open to an expelled member of a voluntary association a remedy under its constitution and laws for a review of the proceedings for his expulsion, and, in case of error, for his restoration, and the association is not a partnership, equity will not interfere.

The New York Stock Exchange is an unincorporated voluntary association, but the seats therein are worth in cash, as shown by the affidavits in this case, at least \$30,000, and the privileges attaching to membership in the board are of great value. The twentieth article of the constitution provides as follows:

- “Members guilty of obvious fraud: Should any member be guilty of obvious fraud, of which the governing committee shall be the judge, he shall, upon conviction thereof by a vote of two-thirds of said committee present, be declared by the members to be expelled, and his membership shall escheat to the exchange.”

By the second article of the constitution the government of the exchange is vested in the governing committee, composed of the president and treasurer of the exchange and of forty members elected as therein provided. The plaintiff in this case claims that he has been illegally and unfairly expelled from the stock exchange, and he has obtained an injunction that the said exchange, and the president and officers thereof, show cause why during the pendency of this action, and until final judgment is entered therein, they should not be enjoined and restrained from excluding the plaintiff from the said exchange, and from asserting against him the resolution of expulsion passed upon him, and from interfering with the exercise and enjoyment by him of his rights and privileges as

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a member of the said exchange, and with the transaction by him of his business in the said exchange as a member thereof, and from transferring or disposing of his seat or membership in the said exchange, and from excluding him from or interfering with the exercise by him of the right to vote at any election of officers of the said exchange, or at any other meeting thereof. The order contains, also, a clause for a temporary injunction until the hearing and determination of the motion to be made under such order. The plaintiff claims that while it is not within the power of a court of law or equity to retry the question on its merits as to whether a member of the stock exchange has been properly expelled, he is entitled to the decision of the court upon the question whether he has been fairly treated according to the constitution which he has signed and agreed to observe, and according to the rules of natural justice and fair play, which ought to regulate all proceedings, judicial in their character, which are not exercised by a court vested with full judicial powers, but by a body selected by the agreement of the parties.

The defendant claims that the rules applicable to proceedings in ordinary courts of justice have no application to proceedings of this character, and that the trial contemplated by the constitution of the stock exchange is one to be had before the governing committee of that body, according to such methods as it may choose to pursue, subject, however, to the conditions that this committee must exercise the authority conferred upon it honestly and in good faith, and that they must afford to the accused party a full and fair opportunity to defend himself. I think that, under the decisions to which I have already referred, it must be conceded that the governing committee of the stock exchange is not bound, on the trial of a member for misconduct involving his suspension or expulsion, by the ordinary rules which obtain in judicial proceedings; but it is equally obvious, from the opinions rendered in those cases, that the courts are authorized to interfere for the purpose of holding the association to a fair

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and honest administration of its rules, and that the association must act fairly and in good faith. The case of *White* agt. *Brownell* (*supra*) seems to have rested in some measure upon the ground that in that case under the constitution and by-laws of the Open Board of Stock Brokers, an appeal could be taken from the decision of the committee on membership to the executive committee; and chief justice DALY, in his opinion, says: "The plaintiff could have appealed from their decision (the committee on membership), if it were erroneous or unjust, to the board of appeals, and he should have resorted to the remedy provided for him within the board before he could ask a court of equity to interfere, upon the ground that an arbitration committee were prejudiced against him."

In the case now under consideration there is no appeal from the decision of the governing committee, and if the proceedings of the committee were fair and honest, and the members thereof were not actuated by bias, prejudice or partiality, their judgment must be deemed to be conclusive upon the rights of the plaintiff. It is stated in the brief of the learned counsel for the defendant that the excepted case in which judicial tribunals will interfere with or review the proceedings of voluntary unincorporated associations in the matter of the expulsion of members cannot, perhaps, be better stated than by saying that where the proceedings resulting in the expulsion of a member are contrary to natural justice a court of equity may interfere. I am inclined to think that this is a correct statement of the rule. Now, in this case it appears that the plaintiff had been a member of the exchange for several years prior to the proceedings instituted against him; that rumors sprang up affecting his reputation for integrity and fidelity, and that publicity having been given to these rumors by an article published in one of the newspapers the plaintiff requested that the exchange should make an investigation. A committee of investigation was accordingly appointed, which made an examination extending over a period of several weeks. The plaintiff appeared before that committee, his books were

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examined, and he was permitted to make statements and explanations in regard thereto. The privilege was accorded to him of cross-examining the witnesses produced before the investigating committee. At the first meeting of the committee on the 4th of April, 1882, it was stated that the plaintiff could not be present, but desired the committee to proceed in his absence. At the meeting of April twenty-eighth, Mr. Duff, the party alleged to have been defrauded by the plaintiff, appeared before the committee, and the plaintiff was present at that meeting. Duff stated that he was willing to answer any questions put to him by the committee, but declined to answer certain questions that were put to him by the plaintiff, which questions are alleged not to have had any material bearing upon the points in controversy, and not to have been insisted on by the plaintiff. It is also alleged by the defendants that the plaintiff never claimed that the sub-committee, or the governing committee, should disregard the whole or any part of the evidence of Duff by reason of his refusal to be cross-examined; also, that the plaintiff requested to be excused from the meeting at which Duff was to appear for the second time, and reluctantly consented so to appear upon Lummis urging him. The plaintiff called no witnesses before the investigating committee or special committee of inquiry, and at a meeting of the governing committee of the stock exchange, held on the 5th day of May, 1882, Mr. Lummis, in behalf of the special committee, reported the result of their labors "after a number of protracted meetings, with voluminous stenographic notes of testimony had before them." It is stated in the minutes of that meeting that the report of the special committee was read to the governing committee in full, and that said report gave at great length the history of their examination of witnesses and into the books, papers and correspondence of the firm of Kennedy, Hutchinson & Co.; that it also gave an exhaustive review of the testimony and charges therein made, and their findings, and that the committee had concluded that from this investigation they had no

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alternative but to report that in the management of the accounts of John R. Duff, William J. Hutchinson and George H. Kennedy, comprising the late firm of Kennedy, Hutchinson & Co., were unfaithful to the trust reposed in them and guilty of improper and illegal practices. This report was signed by Messrs. Lummis, Eames and Alexander. Mr. J. S. Stout also signed the report, adding that "while assenting generally to the report of this committee, I am of the opinion that a certain proportion of the transactions complained of in this case were covered by a full power given by Mr. Duff, and were not committed with the intention of doing him injustice." Mr. S. V. White, the remaining member of the sub-committee, as appeared by the report of the governing committee, attended only two meetings, and was therefore not able to join in the report. The report of the sub-committee was duly accepted by the governing committee. It was then moved and resolved that, in order that all the members of the governing committee might become acquainted with the remaining voluminous report of testimony presented by the sub-committee, the further consideration thereof be postponed to a special meeting, to be held a week from next Wednesday, the seventeenth, at which this shall be the only business heard, and meanwhile the report of testimony be left in the secretary's office, open to the inspection only of the members of the governing committee. On the 17th of May, 1882, the following resolution was passed by the governing committee:

*"Resolved*, That in the management of the account of John R. Duff, W. J. Hutchinson and George H. Kennedy, composing the late firm of Kennedy, Hutchinson & Co., were unfaithful to the trust reposed in them and were guilty of improper and illegal practices, and apparently of obvious fraud, and that charges will promptly be preferred against them under article 20 of the constitution of the exchange."

It was also resolved that the committee appointed to investi-

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gate the conduct of Messrs. Kennedy, Hutchinson & Co., jointly with the law committee, be instructed to immediately prepare charges, under the resolutions as adopted, against Messrs. W. J. Hutchinson and George H. Kennedy, and report at a meeting to be held two weeks from to-day; and that the parties therein mentioned be notified to appear before this committee at that time and answer such charges.

The secretary was directed to forward to Messrs. Hutchinson and Kennedy, immediately, the resolution expressing the opinion of the governing committee after considering the report of the special committee. On the twenty-fourth of May, on the request of the plaintiff, it was ordered that the special meeting of the governing committee appointed for the hearing on Wednesday, the thirty-first, should be postponed to the Monday following, and a motion to allow Hutchinson and Kennedy to appear with, and be defended personally by, counsel was lost. At a meeting held on the 5th of June, 1882, the special business was taken up, Mr. Hutchinson was called in, and the charge of obvious fraud in his dealings with and for the account of Mr. John R. Duff during several years ending December 31, 1881, and the nine specifications under said charge, were read to him and he was informed that each specification would be read in its order, when he could answer to them separately. He answered, denying each accusation in the specifications, and read his defense at great length from a document in his possession, which "he was asked to leave, but preferred to take away." The minutes also recite that, after answering numerous questions by members, he retired. The committee then adjourned until the next day. On the sixth of June the special business was resumed by reading documents received from Mr. Hutchinson, in answer to interrogatories at the last meeting, and Mr. Kennedy was called in. After he had retired Mr. Duff was called in, and after answering questions and "denying generally statements made by Mr. Hutchinson, he retired." Mr. J. H. Brouwer was also called in, and after answering

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"some questions" retired. The minutes of this meeting do not state in full all that occurred, but reference is made in the secretary's minutes to the stenographer's notes of that meeting. From the stenographer's notes it appears that Mr. Luminis said that he did not know whether or not the committee desired any evidence to be given before them by parties other than those accused, but stated that others having knowledge of the facts were in attendance, both Mr. Duff and the members of the present firm of Kennedy, Hutchinson & Co., who were ready to be called if the committee desired. Mr. Bogart expressed a desire that Mr. Duff be called and questioned. He was called, whereupon his examination took place, amounting to about sixteen pages of the stenographic minutes. Thereupon Mr. Wilson moved that this committee now adjourn, and that it meet to-morrow afternoon, and that then the questions that had been asked Mr. Duff and the answers that have been made thereto by him be read to Mr. Kennedy and Mr. Hutchinson, and that they be allowed to answer the same. The motion was seconded. It was opposed by several members on the ground, principally, that what was proposed, if done, would be merely a repetition of what had already taken place before the sub-committee. The motion was thereupon withdrawn. Mr. Brouwer was then called in and examined at some length, his testimony extending from page 147 to page 154 of the stenographer's minutes. A resolution was then offered that this committee, having considered the evidence in the case of W. J. Hutchinson, who had been charged by this committee with obvious fraud, and having heard Mr. Hutchinson in his own defense, find him guilty of obvious fraud, as charged. The resolution was seconded and the ayes and noes called for, arguments having been made and the decisions of the courts referred to on the question of fraud. Mr. Alexander said: "I would like to have Mr. Duff brought here again and Mr. Hutchinson permitted to cross-examine him. I think it is an important point." Mr. Bogart: "I second the motion to do that." Mr. Mack and

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others opposed the proposition of Mr. Alexander. Finally Mr. Alexander moved that the committee adjourn until half-past three of the following day; that Mr. Duff be requested to appear again at that time, and that Mr. Hutchinson be also summoned to appear and have an opportunity to examine Mr. Duff. This resolution was lost, and the vote was then taken upon the various specifications, and the charge was finally sustained.

It is apparent from the proceedings had before the governing committee that Hutchinson and Duff were never brought face to face before that committee, and that Hutchinson never had an opportunity of cross-examining Duff, or of calling upon him for any explanation in respect to any of the testimony which he gave before that committee. It is unnecessary for me in disposing of this motion to determine whether it would not have been competent for the governing committee, after Hutchinson had read his answer, to proceed immediately to vote upon the question of his expulsion. It may be conceded that they would have had the right to do so. But the examination of Duff and Brouwer after Hutchinson had retired was, to my mind, unjust and unfair to the latter, and I am of the opinion that under the decisions to which reference has been made—even confining the power of this court to interfere in proceedings of this nature, within the narrow rule conceded by the learned counsel for the defendant in their eighth point to be the true rule in such cases—a case is presented which calls for the interposition of the court.

When Hutchinson had read his answer, assuming that the members of the governing committee had read the evidence taken before the special committee of investigation, both sides had been heard, and if it was intended to take any further evidence, I think that the ordinary principles of justice and of right required that Hutchinson should have been allowed to be present to confront his accuser and to cross-examine him in respect to any evidence which he might give before the

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governing committee, particularly in view of the fact that Duff had refused to be cross-examined by Hutchinson before the special committee, which consisted, it should be remembered, of but five members of the stock exchange. It seems idle to say that the re-examination of Duff, in the presence of the governing committee, did no harm to Hutchinson, and was but a repetition of what he had stated before the special committee of inquiry. The fact remains that Hutchinson, from the proceedings which had taken place, was justified in the conclusion that the investigation before the governing committee, so far as it related to the taking of evidence, was closed, and that he had been heard upon the evidence against him as it stood. This, too, clearly appears to have been the understanding of prominent members of the governing committee, who have made affidavits upon this motion. In the joint affidavit of Messrs. Lummis and Eames, those gentlemen state that they believe it was the understanding, both of the plaintiff and of the governing committee, that there was no necessity for any further taking of testimony in connection with the case of the plaintiff, and that nothing stood in the way to prevent a final vote being taken on the charge and specifications after plaintiff had read his defense on the 5th day of June, 1882. That on that day the plaintiff read a long, elaborately written answer to the charge and specifications; that he did not deny in that defense the particulars of the facts set out in the charge and specifications, but he denied the conclusions that he had been guilty of fraudulent conduct, and based his defense upon the same view and assertions that he had previously advanced before the sub-committee of inquiry, to wit, that all these questionable transactions had been either authorized by Mr. Duff or subsequently ratified by him; that his written defense proceeded upon the view that the proofs taken by the sub-committee, the minutes of evidence taken by the entries in the books and telegrams and letters of John R. Duff were before the governing committee as evidence against him in support

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of the charge and specifications. That numerous questions were put by members of the committee to the plaintiff on the 5th day of June, 1882, and discussions were had between the plaintiff and members of the committee in which allusions were made, both by them and him, to the testimony taken before the sub-committee and to the facts proved before them and established by the proofs and plaintiff's books and by the reports of the sub-committee; that the plaintiff never asked, suggested or intimated that he wanted to adduce new or additional proof before the governing committee, or that he supposed any new or additional proofs were to be adduced. It is also stated in the affidavit of Messrs. Lummis and Eames that Kennedy was called in his own defense, and that the only other persons that were permitted to appear were John R. Duff and George H. Brouwer, and that they gave no testimony different in substance and general effect from that which had already been given before the sub-committee in the presence of the plaintiff; that the purpose of permitting Duff and Brouwer to appear before the governing committee—as that purpose appeared and from what was said by members of the governing committee—*was to receive from them directly the statements that the sub-committee had already received from them and others*, and that the reason why the motion to adjourn with a view of calling these witnesses again and allowing the plaintiff to appear and cross-examine them was voted down was, that it did not appear to be reasonable or called for, upon any consideration of fairness, that the time of the governing committee should be taken up with a repetition of the testimony that had been had before the sub-committee and the proceedings that had been had before the sub-committee in the presence of plaintiff, or that the proposed course would lead to any material change in the aspect of the case. From this it would appear that there were members of the governing committee who were in doubt—after having read (assuming them to have read) the testimony of Duff and

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Brouwer, reported by the sub-committee to the governing committee—as to the propriety of expelling Hutchinson upon that evidence. The members who voted for their further examination must be supposed to have had a motive in doing so, and it does not seem just or fair to have allowed those witnesses to appear and be examined in the presence of the committee, in the absence of the plaintiff, when, according to the affidavit just referred to, both he and the governing committee did not suppose that any new or additional proofs were to be adduced after he had been heard before the committee, and his books and the report of the sub-committee were under consideration by the governing committee. I do not think that the court is bound to take the opinion of the gentlemen who have made affidavits in this case, that Messrs. Duff and Brouwer gave no testimony different in substance and general effect from that which had already been given before the sub-committee. The testimony taken before the sub-committee has not been presented upon this motion. It is referred to in the papers as being very extensive, and it is stated that its perusal would require much time. That consideration, however, is of no consequence. The testimony, brief or extensive, must be before the court to enable it to determine whether it differed from the testimony given by Duff and Brouwer before the governing committee. The latter testimony is before me, and it is quite apparent from its perusal that that testimony may have had—and necessarily must have had—much weight and effect upon the minds of those members of the committee who were in doubt after having read the testimony before the special committee or after having heard what that testimony was. At page 143 of the stenographic minutes, Mr. Duff says: “I believe that Mr. Hutchinson has robbed me of \$2,000,000.” He also admitted that he was unwilling to be cross-examined before the sub-committee by Mr. Hutchinson. It was stated, however, that he was ready to answer before the sub-committee any question which that committee desired to put to him.

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He was asked also if Mr. Hutchinson should be brought before the committee whether he would answer any questions that might be put to him by Hutchinson in the presence of the committee; to which he answered, "Yes, sir, if it does not prejudice any of my other suits." He was also asked, in substance, whether he had been informed of the alleged improper transactions by Kennedy, Hutchinson & Co., and he answered, "no." He also said that they always made him bear the losses, but did not give him the profits. I repeat, that it is quite apparent that this testimony may have had — and must have had — great effect upon the members of the governing committee who had before been in doubt; and it is also evident from this testimony that Mr. Hutchinson never had cross-examined Mr. Duff in respect to those matters. Upon turning to the testimony of Mr. Brouwer it will be seen that he stated that Duff was never in the habit of inspecting the purchase and sales books of Kennedy, Hutchinson & Co., and also that "we" (referring to the clerks and employes in Hutchinson's office) "were always told never to allow Mr. Duff to look at the books; and when Mr. Duff would come to the desk where they were open, we would immediately close them." Brouwer also stated that instructions had been received to that effect from Mr. Hutchinson. It is stated, as we have before seen in the defendant's affidavits, that Mr. Hutchinson finally mainly rested his defense to the charge brought against him upon the fact that Duff had acquiesced in and ratified the transactions alleged to be fraudulent. It is impossible to conceive of testimony more weighty upon that subject than the testimony which Duff and Brouwer were allowed to give at the meeting of June 6, 1882; after, as has been shown by the affidavits of the defendants, the testimony to be adduced was considered closed both by the plaintiff and governing committee. I do not mean to be understood as saying that the gentlemen who conducted the trial of Hutchinson were not actuated by the most honorable motives. I do not mean to be understood as saying that

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Hutchinson was not guilty of the charge which was brought against him. But I cannot regard the proceedings which were had upon the 6th of June, 1882, at the meeting of the governing committee, as a fair and honest administration of the constitution and rules of the stock exchange in any legal sense. In this case there is no appeal from the decision of the governing committee, such as existed in the case of *White agt. Brownell* (2 *Daly*, p. 329-366). In that case the learned justice, while admitting that courts should be careful not to interfere in the proceedings of such associations, evidently was of the opinion that, if the proceedings were erroneous and unjust, the plaintiff, after having exhausted his right of appeal, could resort to a court of equity for relief. There have been many decisions in the courts in which proceedings analogous to those now under review have been the subject of consideration by eminent judges, and in all such cases it will be found that great stress is laid in the opinion of the court upon the sacred right of an accused party to be fully informed of the charge which has been made against him and to be fully heard in his defense.

In *Thorburn agt. Barnes* (2 *Common Pleas Law R.*, p. 401), a case relating to an award, WILLES, J., says: "It was certainly not put too high by Mr. Brett when he said that it is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them."

BAYLEY, baron, in *Capel agt. Child* (2 *Crompton & Servis*, p. 558), said: "I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without his having an opportunity to be heard. There is the case of *The King agt. Benn & Church* (6 *Term Reports*, p. 198), in which, where a warrant of distress, which is in the nature of an execution, had issued, not grounded on a previous summons, lord KENYON laid it down most distinctly as an invariable maxim of our law, that

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no man shall be punished before he has had an opportunity of being heard."

In *Wood* agt. *Woad* (*Law Reports, Exchequer*, vol. 9, p. 194), which was a case where the plaintiff alleged that he had been wrongfully and improperly expelled from a mutual insurance company, chief baron KELLY said: "This, then, is the great question in the case: Was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any court. But they are bound, in the exercise of their functions, by the rule expressed in the maxim — *audi alteram partem* — that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defense. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

This case seems to be fully in point, inasmuch as it related to the expulsion of a member from a society attached to the membership of which were valuable rights and privileges.

Again, while these proceedings are not to be governed by the strict rules which apply to actions at law or suits in equity, or even, perhaps, by the rules which obtain in regard to arbitrations, there is, I think, a strong analogy between the principles which govern in arbitrations and those which relate to proceedings of this character. In the case of *Sharpe* agt. *Bickerdyke* (3 *Dow's Rep.*, 102), lord ELDON said that by the "great principle of eternal justice which was prior to all these acts of *sederunt* regulations and proceedings of court, it was impossible an award could stand where the arbitrator heard

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one party and refused to hear the other; and on this great principle, and on the fact that the arbitrator had not acted according to the principles upon which he himself thought he ought to have acted, even if he decided rightly he had not decided justly, and, therefore, the award could not stand."

*In the Matter of Plews* agt. *Middleton* (6 A. E., N. S., 845), an award was set aside because the three arbitrators, after having determined within a small amount the sum to be paid, agreed to examine a witness separately, and did so. COLERIDGE, J., in that case says: "To uphold this award would be to authorize a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other and from the parties to the reference, whereas it ought to have been conducted by the arbitrators and umpire jointly in the presence of the parties."

In *Oswald* agt. *Earl Grey* (24 *Law Journal*, Q. B., 69) it was held that no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party.

In *Walker* agt. *Frobisher* (6 *Vesey*, 69) an award was set aside, the arbitrator having received evidence after notice to the parties that he would receive no more, in which they acquiesced. In this case lord ELDON says: "A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported." This decision also seems peculiarly applicable to the averments contained in the joint affidavit of Messrs. Lummis and Eames, that the testimony given by Duff and Brouwer before the governing committee was not different in character or effect from that which these witnesses had given before the special committee of inquiry. Both of the affiants sat in judgment upon the plaintiff in this case, and it does not seem just or fair that they should take evidence in his absence, without notice to him, and determine that

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that evidence had no force or effect in producing the final result.

In *Drew* agt. *Drew* (2 *Macqueen's House of Lords Cases*, p. 1) it was held "that an arbitrator greatly errs if he, in any of the minutest particulars, takes upon himself to listen to evidence behind the back of any of the parties to the submission (See particularly remarks of Lord Chancellor Cramworth, at p. 9).<sup>\*</sup> In *Fisher* agt. *Keane* (11 *Chancery Division*, 353) it was held "that the committee of a club, being a *quasi* judicial tribunal, was bound, in proceedings under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offense warranting his expulsion from the club without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending or palliating his conduct; and that the court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence, and purporting to expel him from the club, to be null and void, and will restrain the committee, by injunction, from interfering by virtue of such a resolution with his rights of membership."

The principle to be deduced from all these cases is that in every proceeding before a club, society or association having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge and to be fully and fairly heard.

In this case Hutchinson was not heard after Duff and Brouwer had been called in to satisfy members of the governing committee who were in doubt, even after hearing the

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<sup>\*</sup> The recent case of *The National Bank of the Republic* agt. *Darragh* (30 *Hun's Reports*, p. 29), decided by the general term of this department, shows how rigidly courts have maintained the rule that arbitrators should receive no evidence after a cause had been submitted, which might by any possibility influence their award. —[Ed.]

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report of the sub-committee and reading the testimony of Duff and Brouwer there given, after having heard Hutchinson's answer to the charge made in the report of the sub-committee. Various other questions were discussed upon the argument of this motion which I do not deem it necessary now to consider. It seems to me that the action of the governing committee of the stock exchange in examining Duff and Brouwer, after Hutchinson had retired, upon points so vitally affecting his character, reputation and property, was not just or fair to him in either a legal or equitable sense; that it was contrary to the rule which should obtain in all proceedings had in bodies such as the stock exchange, for the expulsion of members, and therefore I deem it my duty to continue the injunction heretofore granted until the cause can be tried (*See Wood agt. Wood, L. R., 9 Ex., 190, supra*).

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## N. Y. SUPREME COURT.

In the Matter of the Estate of JESSE HOYT, deceased.

*Code of Civil Procedure, section 2818 — Practice as to probate of a paper propounded as a will — Witnesses to be examined — Proof required, and manner of obtaining it.*

The proponents of a paper which is claimed to be this decedent's will lately finished the presentation of their proofs. The contestant, through her counsel, thereupon filed an affidavit alleging facts which tend to show that the testimony of certain persons in such affidavit named "may be material" to the issues of this proceeding. The contestant also caused to be filed and to be served upon the proponents a notice to the effect that, before proceeding to introduce proofs in opposition to probate, she required the examination of the persons in such affidavit named :

*Held, first*, that the duty of producing such witnesses falls upon parties proponent, not because the statute so declares, but because, as it fails to impose that duty upon parties contestant, they can rest securely upon the fact that, until such witnesses have been produced and examined, the will cannot be admitted to probate.

*Second.* The course of the examination of witnesses brought into court by proponents at the instance of contestants, is a matter purely in the discretion of the surrogate. Such witnesses must be examined, because the law demands their examination, whenever the proper notice has been filed and the surrogate has found them to be material. They are not to be charged, so to speak, to the account of either party. They are to be examined by the surrogate. The surrogate can require counsel to assist him in the examination. Neither party can demand, as of right, the opportunity of first examining the witness who has been produced in pursuance of the notice, and neither party can demand, as of right, that his opponent shall begin such examination. The surrogate should see to it that both parties are afforded a fair opportunity for full and searching investigations. In most instances, where witnesses shall be thus brought into court at the request of contestants, it will be the most natural course to call upon the contestants themselves to pursue the inquiry in the first instance, because, presumably, they will be better advised than their adversaries as to the precise matters which they wish and expect to prove ; but in such cases a direction to the contestants to begin the inquiry, will not of itself involve any limitation upon their right of making that inquiry as searching and thorough as they would have been permitted to make it if the witness

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had been voluntarily produced by the opposite party and had testified in its behalf.

*Third.* As to when witnesses produced in accordance with section 2618 of the Code of Civil Procedure are to be examined, it is a mere question of the order of proof, and is entirely within the discretion of the surrogate. In the exercise of such discretion he would ordinarily permit the party applying for the examination to decide for himself when that examination should be had.

*May, 1884.*

ROLLINS, *J.* — Section 2618 of the Code of Civil Procedure contains the following provisions as to proceedings in surrogates' courts for the probate of a paper propounded as a will :

"The surrogate must cause the witnesses to be examined before him. The proofs must be reduced to writing. Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify.  
\* \* \* \* Any party who contests the probate of the will may, by a notice filed with the surrogate at any time before the proofs are closed, require the examination of all the subscribing witnesses to a written will, or of any other witness whose testimony the surrogate is satisfied may be material; in which case all such witnesses who are within the state, and competent and able to testify, must be so examined."

What is the meaning of the words above quoted, and how, if at all, have they changed the course of procedure which obtained in probate controversies before the enactment of the Code ?

These questions arise upon the following state of facts: The proponents of a paper which is claimed to be this decedent's will, lately finished the presentation of their proofs. The contestant, through her counsel, thereupon filed an affidavit, alleging facts which tend to show that the testimony of certain persons in such affidavit named "may be material" to the issues of this proceeding. The materiality of this testi-

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mony does not seem to be disputed. The contestant also caused to be filed and to be served upon the proponents a notice to the effect that before proceeding to introduce proofs in opposition to probate, she required the examination of the persons in such affidavit named. None of those persons were produced for examination on the day specified in the notice.

Upon these facts I am now asked to determine :

*First.* Are the proponents bound under the provisions of section 2618, above quoted, to produce before the surrogate the persons named in the notice ?

*Second.* When those persons shall be produced, what will be the respective rights and privileges of the parties hereto in reference to their examination ?

*Third.* In case it shall be decided that the proponents are responsible for their production, shall the contestants be conceded as of course the right to an immediate examination, or is it discretionary with the surrogate when such examination shall be had ?

Upon these questions the views of opposing counsel are utterly at odds. On the one hand it is claimed that section 2618 has made a radical change in the procedure of surrogates' courts, and has very substantially enlarged the powers and privileges of contestants. It is insisted, on the other hand, that the section in dispute has effected no essential modification in the law as it existed before the enactment of the Code. It is manifest that the particular facts and circumstances of this case are of no importance to the present inquiry, and I shall, therefore, refrain from commenting upon them. The matters now to be decided are purely matters of general practice and procedure, whose determination in the case at bar will be applicable to all other cases of disputed probate.

I understand contestants' counsel practically to claim that parties opposing the probate of a will are no longer required, unless they choose so to do, to produce witnesses in their own behalf and submit them to the cross-examination of their

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adversaries, but that, on the contrary, they can require their adversaries to produce and examine in chief every person who can give evidence material to the issue, and that at the conclusion of such examination they themselves can exercise all the privileges of cross-examination, with such right of impeachment, contradiction, &c., as that privilege ordinarily carries with it.

In opposition to this view it is insisted on behalf of the proponents that section 2618 does not in terms require at their hands either the production for examination or the examination of any of the witnesses included in the contestants' note. They contend that the sole purpose which that section aims to accomplish is to secure to contestants the absolute power of preventing the admission of a will to probate until they have first been afforded an opportunity of taking the testimony of every witness whom the surrogate shall decide to be material. Either of these constructions is plausible enough, and both of them have been supported by ingenuous and elaborate arguments.

As the language of the section is fairly susceptible of such widely different interpretations it is well to inquire what statutory provisions *in pari materia* were in force at the time of its enactment. An examination of this question discloses the fact that all those portions of the Code which relate to the mode of proving a will are founded in the main upon the provisions of two statutes which were operative for forty years after their enactment, and which were but recently abrogated by the general repealing act which took effect simultaneously with the taking effect of the Code itself. One of those statutes is chapter 460 of the Laws of 1837, the other is chapter 129 of the Laws of 1841. The former act provided in its tenth section that in a proceeding for the probate of a will the surrogate should "cause the witnesses to be examined before him. All such proofs and examinations," it said, "shall be reduced to writing. Two at least of the witnesses to such will, if so many are living in this state and are of sound mind

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and are not disabled from age, sickness or infirmity from attending, shall be produced and examined."

Section 11 provided as follows: "In case the proof of any such will is contested, and any person having the right to contest the same shall, before probate made, file with the surrogate a *request in writing* that all the witnesses to such will shall be examined, then all the witnesses to such will who are living in this state and of sound mind, and who are not disabled \* \* \* from attending, shall be produced and examined."

Section 17 declared that no will should be deemed proved until the witness to the same residing within this state at time of such proof, of sound mind, &c., should have been examined pursuant to law.

By chapter 129 of the Laws of 1841 the scope of section 11 of the act of 1837 was greatly enlarged. It was made to apply to all witnesses whom any person interested in the proof of the will should "*request to be examined*," and that, too, whether such witnesses were or were not subscribing witnesses to such will, provided only that the surrogate should first be satisfied that they could give material testimony. It will be observed that the "request" above referred to could be made by any parties to the proceeding, by proponents as well as by contestants. This word "request," as used in the acts of 1837 and 1841, has, it seems to me, substantially the same meaning as the word "require" in section 2618 of the existing law. The change of phraseology has not made, and could not have been intended to make, any change in the signification. Now, while the statute of 1841 was in force, what would have been the effect of a "request" made, in pursuance of its provisions, by any party interested in the proceeding? Would it have imposed upon the opposite party the duty of producing and examining the witnesses, whose examination was so "requested," and would it have given the party so "requesting" rights of cross-examination, impeachment, contradiction, &c., superior to those which his antagonist

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could have exercised? Such an interpretation of section 11 would have practically made possible at every trial this extraordinary state of affairs, that proponents could have been compelled to produce and examine as their own witnesses all persons whose testimony was wanted by the contestants, and that contestants could have been similarly compelled to produce and examine as *their* witnesses all persons whose testimony the proponents desired.

It can scarcely be contended that the legislature ever meant to bring about such a complete inversion of the customary and orderly procedure of a judicial investigation. The purpose and the meaning of the statutes of 1837 and 1841, so far as their provisions relate to the subject in hand, are not hard to understand. Those statutes contemplated, as the present Code contemplates, that a proceeding for probate is often conducted by the surrogate, without the intervention of counsel, either for or against the will, and without the formulating of any distinct and definite issues. They prescribed, therefore, that a certain specified amount and kind of evidence should be the absolute prerequisite of the admission of a will to probate, and that, too, even though no person interested appeared in opposition; and they provided simple and efficacious means by which a contestant might insist upon the production of certain other evidence, and might prevent the entry of a decree establishing the will until that evidence had been introduced.

I think that the substitution of the Code provisions for those contained in the acts of 1837 and 1841 has not served to enlarge in any respect the rights which contestants formerly enjoyed. My construction of section 2618 is this: by filing such a notice as is therein mentioned, and by satisfying the surrogate of the materiality of the witnesses whom such notice specifies, contestants can effectually block the probate of a disputed will until such witnesses (if competent, within the state, &c.) have been examined. If after filing such a notice contestants should cease to take any active part in the proceeding it would, nevertheless, be the duty of the surrogate

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to take heed that no decree should be entered admitting the will until the witnesses named in the notice had been first examined.

For this reason I hold that the duty of producing such witnesses falls upon parties proponent, not because the statute so declares, for it does not, but because, as it fails to impose that duty upon parties contestant, they can rest securely upon the fact that until such witnesses *have* been produced and examined the will cannot be admitted to probate.

*Second.* Then comes the question, by which party should the witnesses produced according to notice be first examined? In answering this inquiry it is important to consider a fact which has been the subject of comment by the counsel on both sides of this controversy. I refer to a peculiarity of probate proceedings which distinguishes them from almost all other judicial investigations. When once an instrument purporting to be a will has been produced before the surrogate, and parties in interest have been summoned to attend its probate, it is no longer under the control of the persons who have propounded it. They cannot claim the right to withdraw it from the files, even though all persons interested consent to that course. Nor, on the other hand can they by obtaining the consent of all such persons, procure its admission to probate.

The proceeding is, in effect, a proceeding *in rem*. The surrogate must enter a decree pronouncing for or against the will. The parties may, of course, be active or passive, and may favor or oppose probate according to their interests or inclinations. But whatever course they may pursue, it is the surrogate's duty (*sec. 2622 Code*) "to inquire particularly into all the facts and circumstances," and not until he himself is "satisfied of the genuineness of the will and the validity of its execution" can he admit it to probate (*Ibid*).

These considerations lead me to the conclusion that the course of the examination of witnesses brought into court by proponents at the instance of contestants is a matter purely in the discretion of the surrogate. Such witnesses must be

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examined because the law demands their examination, whenever the proper notice has been filed and the surrogate has found them to be material. They are not to be charged, so to speak, to the account of either party. *They are to be examined by the surrogate.* In cases where the proceeding before the surrogate has assumed, as it has here assumed, the form of a trial, in which the parties are represented by counsel, the surrogate can doubtless require such counsel to assist him in the examination.

But it seems to me that neither party can demand, as of right, the opportunity of first examining the witness who has been produced in pursuance of the notice, and that neither party can demand, as of right, that his opponent shall be required to begin such examination. The surrogate should see to it that *both* parties are afforded a fair opportunity for full and searching investigation. In many instances — perhaps most instances — where witnesses shall be thus brought into court at the request of contestants, it will be the most natural course to call upon the contestants themselves to pursue the inquiry in the first instance, because, presumably, they will be better advised than their adversaries as to the precise matters which they wish and expect to prove; but in such cases a direction to the contestants to begin the inquiry will not of itself involve any limitation upon their right of making that inquiry as searching and thorough as they would have been permitted to make it, if the witness had been voluntarily produced by the opposite party, and had testified in its behalf.

How far, if at all, the conduct of the examination of such witnesses may properly be regulated by a consideration of their friendliness or unfriendliness to the one party or the other, or by other circumstances apparent when they are upon the stand, is a matter which will be determined when the occasion for its determination arises.

*Third.* There only remains to be considered the question when it is that witnesses produced in accordance with section

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2618 are to be examined. I hold that this is a mere question of the order of proof and that it is entirely within the discretion of the surrogate. In the exercise of such discretion he would ordinarily permit the party applying for the examination to decide for himself when that examination should be had. In the present case I can see no reason why the testimony of the persons named in the notice should not be taken at once, if the contestant so desires. As those persons are severally called to the stand the court will give whatever special direction as to their examination the circumstances shall seem to warrant.

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## SUPREME COURT.

JEROME B. WIGGINS agt. ADNEY P. DOWNER.

*Jury — Communication between judge and jury in the absence of counsel — Improper communication with the jury by an officer in charge — When not ground for new trial.*

The jury was instructed by the court in its charge to pass upon four questions of fact, and that if they decided all of those questions in favor of the plaintiff their verdict should be for him, but that if they decided in favor of the defendant upon any one of those questions their verdict should be for the defendant. After being out for several hours the jury came into court and stated that they were unable to agree, whereupon they were told by the presiding justice in open court that he did not feel warranted in discharging them until they had given the case further consideration. Upon being asked by one of the jurors to repeat the four propositions which they were to pass upon, the justice outlined them, as he had previously stated them in the charge, and said, "if you find for the plaintiff you must find on each one of these questions in favor of the plaintiff." Neither party was present in person or by counsel, the defendant's counsel having left the city:

*Held*, that it was not an error for which a new trial should be granted for the judge to thus instruct the jury in open court, but in the absence of counsel whose attendance could not have been secured before morning. An expression to a jury by an officer in charge of an opinion that unless they agreed they would be detained until the next day at noon, although

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improper, is not such an irregularity as should avoid the verdict. It does not amount to an illegal restraint.

While the affidavits of jurors will not be received to show their own misconduct, or that of their fellows, they are probably admissible to show the misconduct of the officer having them in charge, but not to show its effect upon their own minds. Jurors should not be permitted to stultify or criminate themselves by swearing that they sacrificed their convictions in order to be relieved from a temporary inconvenience.

*Onondaga Special Term, January, 1884.*

**MOTION** by defendant for a new trial upon the ground that the court instructed the jury in the absence of counsel, and the officer in charge of the jury held an improper communication with them.

The cause was tried at the Oneida circuit on the 21st of November, 1883, and resulted in a verdict for the plaintiff. This motion was argued at the Onondaga special term on the 5th of January, 1884, a stay of proceedings having been granted at the circuit to enable the defendant to move to set aside the verdict upon the grounds above named.

*Charles H. Searle*, for motion.

*J. I. Sayles*, opposed.

**VANN, J.** — Upon the trial of this case the jury was instructed by the court in its charge to pass upon four questions of fact, and that if they decided all of those questions in favor of the plaintiff their verdict should be for him, but that if they decided in favor of the defendant upon any one of those questions their verdict should be for the defendant. The jury retired in charge of an officer late in the afternoon, and at the close of the evening session, at about nine o'clock, came into court and stated that they were unable to agree, whereupon they were told by the presiding justice in open court that he did not feel warranted in discharging them until they had given the case further consideration. One of the jurors then asked the court to repeat the four propositions

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which they were to pass upon, and the justice outlined the four questions of fact as he had previously stated them in his charge. No instruction was given them upon any question of law, except in these words, as taken from the minutes of the stenographer, "if you find for the plaintiff you must find on each one of these questions in favor of the plaintiff." The jury then retired and the court adjourned. Neither party was present in person or by counsel at the time these instructions were given. The counsel for the defendant had left the city where the court was sitting and had gone to his home in Utica. Was it an error for the judge to thus instruct the jury in open court, but in the absence of counsel, whose attendance could not have been secured before morning?

Many decisions have been made in this state bearing somewhat upon the question, but none to which my attention has been called directly in point. *Thayer* agt. *Van Vleet* (5 *Johns.*, 111) arose in justices' court, and it appeared that after the jury had retired they sent for the justice, who went into their room, and on being asked if they could add anything to the charge of the plaintiff replied "no," and left them. It was held not an irregularity for which the verdict ought to be set aside as there was no semblance of abuse and the consent of the parties might be inferred.

In *Bunn* agt. *Croul* (10 *Johns.*, 239) it was held that a justice of the peace could not in the absence of the parties, or without their consent, answer a question as to whether certain evidence had been given when asked by the jury after they had retired to make up their verdict.

In *Taylor* agt. *Betsford* (13 *Johns.*, 487) it was held that a justice of the peace could not after the jury had retired enter their room at their request, but apart from and without the consent of the parties, to answer certain questions.

In *Benson* agt. *Clark* (1. *Cow.*, 258) after the jury had retired the justice at their request, but without the consent of the parties, entered the jury room where certain questions were put to him by the jurors which he did not answer, but

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retired. Soon after the jury sent by the constable for a certain paper, which the justice sent to them. It was held that both acts were irregular.

In *Neil* agt. *Abel* (24 *Wend.*, 185) it was held error for the justice without the consent of the parties to permit the jury to use his minutes after they had sent for them by the constable.

In *Plunkett* agt. *Appleton* (51 *How.*, 469; *S. C.*, 9 *Jones & Sp.*, 169), the judge, without the knowledge of counsel, sent written communications to the jury answering certain questions of law which they addressed to him in writing and sent in by the officer. The verdict was set aside as irregular.

From these cases, and others of like character that might be cited, it is clear that a judge should not privately communicate with the jury, either by entering the room where they are deliberating or by means of written communications. A violation of the rule may afford ground for a new trial, even if no harm is shown to have resulted from it to either party, although this may be doubtful since the decision of *Mahoney* agt. *Decker* (18 *Hun*, 365). The principle upon which the rule rests is that such communications are so dangerous and impolitic that they will be conclusively presumed to have influenced the jury improperly. According to the cases the source of danger is the secret nature of the communications. But in this case all that was said was in open court, and at a time when it was impossible to notify counsel. There was no secrecy, and hence the usual element of danger was wanting. Some of the cases suggest a distinction between instructions in open court, although in the absence of counsel, and a private communication.

In *Watertown Bank* agt. *Mix* (51 *N. Y.*, 559) the judge answered somewhat blindly a written question relating to the evidence sent to him by the jury by writing his answer beneath and returning it, but without informing counsel. JOHNSON, C., in delivering the opinion of the court, said: "It is, in my opinion, better and safer to adhere to the rule, as

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affirmed by the adjudged cases and by what I understand to be the settled usage in this state, that there ought to be no communication between the judge and the jury after they have gone from the bar to consider of their verdict in relation to the oral evidence or his instructions to them, *unless it take place openly in court* or with the express assent of the parties."

While the point was not presented for decision, the plain intimation is that instructions in open court are to be classed with those given with the express assent of the parties.

In *Sargent* agt. *Roberts* (1 *Pick.*, 337, 341) the court said: "We are all of the opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the court, *unless in open court, and, where practicable, in presence of the counsel in the cause.*"

The point was not presented in this case, but the true rule was suggested.

The trial of a case does not end until a verdict is had, because if there is no verdict, in the eye of the law there is no trial. Therefore counsel who leave court before the verdict is announced, leave before the trial is finished. They do this at their peril, and take the risk of further instructions being given, openly from the bench, so long as court is in session, and the jury still out. While, as a matter of courtesy, but not as a matter of right, it is customary to send for counsel upon the return of the jury for information of any kind; when, by the act of counsel, it is impracticable to do so, the omission cannot be urged as a ground for a new trial. To hold otherwise would enable counsel, either by negligence or design, to compel the court to discharge the jury before they had given the case enough consideration, or to confine them in the jury room until it suited the convenience or inclination of counsel to come into court when further instructions might be given, and the jury could intelligently resume their delib-

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erations. No evil can result from this rule, except that the court would not have the aid of suggestions from counsel, but this would cause less inconvenience than to suspend business. Exceptions could be allowed upon the appearance of counsel, or even upon the settlement of a case, and the time for instructions, as a matter of right, upon request, would have passed. The public nature of the communication would guard it from all danger or impropriety.

In New Hampshire and South Carolina it is well settled that the court may even privately communicate with the jury (*Allen* agt. *Aldrich*, 29 *N. H.*, 63, 74; *Bassett* agt. *Salisbury Manfg. Co.*, 28 *N. H.*, 438, 457; *Shapely* agt. *White*, 6 *N. H.*, 172, 176; *Goldsmith* agt. *Solomons*, 2 *Strobhart*, 296).

While the decisions are more stringent in other states, I find no case at variance with the rule here laid down.

From the affidavits of three of the jurors it appears that after the jury had deliberated for about fifteen hours, they sent word to the court by the officer in charge that they could not agree; that the constable retired for a moment, and upon returning stated that the judge said "they must agree, or he would keep them until to-morrow noon." One of the three jurymen says that the substance of the statement of the constable was, that "the judge said he would not discharge them; that they must agree." Thereupon, the affiants swear, the minority of four compromised with the majority and agreed to the verdict that was rendered, and that they did so to get discharged. A fourth juror swears that the jury stood ten to two all night, and says that he did not hear or know that the constable made any such statement. The officer denies that he made the statement, but intimates that he said something to the jury, without stating what it was. He, however, claims that he strictly kept and observed his oath.

While the affidavits of jurors will not be received to show their own misconduct or that of their fellows, they are probably admissible to show the misconduct of the officer having them in charge (*Thomas* agt. *Chapman*, 45 *Barb.*, 98;

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*Hilliard on New Trials*, 337), but not to show its effect upon their own minds (*Id.*; *Thompson & Merriam on Juries*, 431). Jurors should not be permitted to stultify or criminate themselves by swearing that they sacrificed their convictions in order to be relieved from a temporary inconvenience.

Communications between the jurors and the officer having them in charge may furnish ground for a new trial, where they had a manifest tendency to influence the jury improperly against the unsuccessful party, or where they were such that prejudice may have resulted (*Thomas agt. Chapman, supra*; *T. & M. on Juries*, 428, 431).

No such message was in fact sent to the jury by the court, and I do not find that any such was delivered. Possibly the constable or some jurymen may have expressed the opinion that unless the jury agreed they would be detained until the next day at noon, when it was known that the circuit was to adjourn for the week. But assume that the constable did make the alleged statement, and that the jury thought it was a message from the court, the impropriety of such a proceeding is conceded, but would it be such an irregularity as should avoid the verdict? Would it amount to an illegal constraint? For there must always be some constraint; but abuse should not be permitted.

The old case of *Green agt. Telfare* (11 *How.*, 261), decided by judge HARRIS in 1853, was expressly repudiated in *Erwin agt. Hamilton* (50 *How.*, 32), decided by judge WESTBROOK in 1875. In the latter case the jury, after announcing their inability to agree, were told in effect by the judge that he could not discharge them, but would return after supper and wait a reasonable time for a verdict, and if they failed to agree by that time the court would adjourn until the following Monday at three P. M., then distant nearly seventy hours, when they could bring in a sealed verdict. This was held to be regular.

In *Slater agt. Mead* (53 *How.*, 57), decided at special term in 1876, the jury, after being out a long time, reported that

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they could not agree. The judge said to them: "You must agree upon a verdict. I cannot discharge you until you agree upon a verdict." The verdict was set aside as induced by constraint.

In *Leach* agt. *Wilbur* (9 *Allen*, 212) one of the jurors asked the officer how long the court would keep them together, and he replied that he did not know but they would have to stay till Saturday night. This was held no ground for a new trial, though censurable on the part of the officer.

In *Pope* agt. *State* (36 *Miss.*, 121 [1858]) the officer in charge told the jury, while deliberating in a case of felony, "that unless they decided the case one way or the other they would have nothing more to eat and no water to drink." Some of the jurors understood him to say this by direction of the court, yet it was held no ground for a new trial.

In *White* agt. *Colder* (35 *N. Y.*, 183) it was held, *MORGAN, J.*, dissenting, not to be an error for the judge to refuse to discharge the jury until they had agreed upon their verdict, and that it was wholly within his discretion when to discharge them.

It is in the power of the court, without threatening constraint, to actually constrain a jury by confining them for a long time with nothing to eat. In this case everything reasonable was provided for the comfort of the jury. They had their regular meals. If the remark imputed to the constable had been made by him, its power to constrain would be less than a state of semi-starvation. While the jury might justly complain of the discourtesy in the case supposed, it could not be held that the coercion was illegal or unreasonable. Aside from the question of taste or courtesy, it is no worse to threaten coercion than it is to practice it, yet of necessity it must be practiced, within reasonable limits, by all judges who preside over trials by jury. Twelve honest, independent minds do not readily concur in judgment upon disputed questions of fact. Some effort is necessary in order

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to agree. That effort must be encouraged and required by the court, if the business of the country is ever to be done. If the effort is successful, the result should not be done away with upon a mere question of courtesy, where no one is injured, and the court is satisfied that the verdict is right.

The motion is denied, with ten dollars costs.

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### N. Y. SUPERIOR COURT.

TIFFANY *et al.*, plaintiffs, agt. THE UNITED STATES ILLUMINATING COMPANY, defendants.

*Easement — Light, air and free access to premises part of easement in public street — Legislature no power to permit erection of poles for electric wires without providing for compensation to owners of premises — Questions of fact.*

*Not, see*

The legislature has no power to permit, by the erection of poles for the support of electric wires in front of a person's premises, the taking of such person's property by impairing the use and enjoyment of the light, air and free access to his premises, which forms part of his easement in the public street, without having provided for the payment to such person of due compensation therefor.

Whether the erection of the poles would have been a substantial impairment of the use of such easement is a question of fact.

*Special Term, April, 1884.*

O'GORMAN, *J.* — When this motion for the continuance, *pendente lite*, of an injunction restraining the defendant from erecting poles for the support of electric wires in front of plaintiffs' premises was argued, I believed that the case would soon be reached in its order and tried on all the issues raised on the pleadings, and that it was not necessary that an early decision of this motion should be made by me. Some time, however, having elapsed since the argument, and no trial of the case having yet taken place, it comes in the course of my ordinary duty to make such disposition of the motion as seems

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to me proper on the facts as they were presented to me on the moving papers.

I will assume, for the purposes of this motion, that the legislature, as far as it had the power, has given full authority to the defendants to erect the poles in question, and that the board of aldermen, as far as they had power, have acquiesced in the legislative act.

A question of law, however, is raised and must be considered, whether the legislature has not exceeded its powers in permitting the taking of plaintiffs' property by impairing the use and enjoyment of the light, air and free access to their premises, which formed part of their easement in the public street, without having provided for the payment to the plaintiffs of due compensation therefor.

If the plaintiffs had property in such easement, and were threatened with substantial loss or impairment of such property, then the legislature, failing to provide for compensation, exceeded its powers.

The constitutional prohibition on the subject is clear and emphatic: "No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

This is the supreme law of the land, not to be violated or evaded, or impaired in its full force and effect; and no benefit to the public, however great, that might be anticipated from any new invention or improvement, would justify any disregard of it.

This has been declared to be the law by the highest legal tribunal in this state, in a series of decisions extending over many years back. Of these decisions the case of *Story* agt. *Elevated Railroad Company* (90 N. Y., 150) is one of the latest, and in it the rights of owners of premises abutting on public streets by the impaired use of their easement, of light, air and free access to and from the street, have been defined and sustained.

The legislature cannot materially change or enlarge the

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nature of the right of the public in a street (*Williams* agt. *N. Y. C. R. R. Co.*, 16 *N. Y.*, 107). Encroachment on such an easement is a taking of property (*Story* agt. *Elevated R. R. Co.*, *supra*, 171). No structure on a public street can be authorized that is inconsistent with the continued use of the street (*Id.*, 177, 193; *Mahady* agt. *Bushwick R. R. Co.*, 91 *N. Y.*, 153).

Permission to build structures on land subject to an easement, is inconsistent with the continued use and enjoyment of the easement, and works an extinguishment of the easement (*Cortwright* agt. *Mapleson*, 52 *N. Y.*, 623). An easement of light and air has value (*Doyle* agt. *Lord*, 64 *N. Y.*, 432). This principle, as applied to telegraph poles, was considered and recognized in *Dusenbury* agt. *Mutual Telegraph Company* (*Sup. Ct.*, *General Term*, *Dec.*, 1882; 11 *Abb. N. C.*, 440); *Board of Trade* agt. *Telegraph Company* (*Ill. Sup. Ct.*, *Oct.* 2, 1883; 29 *Alb. Law Jour.*, 92).

Whether the erection of the poles, in the case at bar, would have been a substantial impairment of the plaintiffs' use of their easement in light, air or free access to and from the street, is a question of fact, and, as far as is shown by the papers used in this motion, the preponderance of evidence seems to be in favor of the plaintiffs.

The poles in question are not meant to sustain electric lamps, but only the wires connecting with the lamps, and by means of which the light is to be supplied. They are, therefore, not, strictly speaking, lamp posts; and posts of the dimensions stated in the moving papers, placed in front of the entrance to the plaintiffs' store, might well create a serious hindrance to free access to it.

It is also averred, and not denied, that the lighting power can be, and actually is in some parts of this city, conveyed to the lamps by underground connection, and by means not involving any risk of damage to the plaintiffs.

The use of the street by the erection of these poles would be therefore unnecessary, and in so far as it inflicted special

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damage on plaintiffs, constituted a cause of action (*Green agt. Central R. R. Co.*, 65 *How.*, 165).

It is charged, also, that some injurious interference by the defendants with the cellar of the plaintiffs is threatened, and plaintiffs aver that if the threatened erection of such poles be accomplished, they will suffer irreparable injury thereby.

The defendants deny any intention to erect poles in front of plaintiffs' premises, or in any way to molest plaintiffs' property or rights; and they aver that plaintiffs' apprehensions are wholly groundless.

There may be other questions of law and fact which have been raised on the papers, but which do not seem to be material or necessary to be considered on this motion, and which can be best examined upon the trial of the action.

On the case as presented to me, I am of the opinion that there is a preponderance of evidence in favor of the plaintiffs, and that the injunction already granted should be continued "*pendente lite*."

I have the less hesitation in arriving at this conclusion, because it could only prevent or impede the carrying out of a project which the defendants aver that they do not entertain.

The motion for the continuance of the injunction, "*pendente lite*," is granted, without costs.

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### N. Y. COMMON PLEAS.

MARY BRADLEY, administratrix, agt. NESTOR DE GOICOURIA.

*Landlord and tenant—Constructive eviction—Facts which establish such eviction and relieve tenant from paying rent.*

In a suit for rent claimed to be due from a tenant of a suite of rooms in an apartment house, it appeared that defendant's wife and servants were taken sick by inhaling a malarial or poisonous gas in the apartments occupied by them; that this unhealthy condition of the apartment was owing to the defective condition of the general plumbing work of

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the house, of which the landlord was notified by orders he received from the board of health, requiring him to have changes made in the plumbing work, and which unhealthy condition could have been removed if he had complied with those orders; that the defendant waited for two weeks, and, finding that nothing was done on the part of the landlord, left, under the apprehension that he was imperiling the health of himself and family by remaining.

*Held*, that this state of facts established a constructive eviction, and prevention of the free enjoyment of the apartments, so as to relieve the defendant from paying rent for them.

*General Term, May, 1884.*

*Thomas C. Ennever*, for appellant.

*Condert Brothers*, for respondents.

DALY, C. J.— This was an apartment house known as the Oakland Flats, the general duty of keeping which in repair was upon the landlord, and not upon the tenants of the separate apartments, each tenant being answerable only, under the covenant in his lease, for such repairs as were necessary in his separate apartments or suite of rooms occupied by him. It was the duty of the landlord to keep the general plumbing work of the house in repair; and the defendant, as the occupant of a separate suite of apartments, was bound only to make such repairs in the plumbing therein as required no change in or was independent of the general plumbing work of the house.

It was proved by the defendant's witnesses that the defendant's wife and servants were taken sick by inhaling a deleterious gas, which permeated the defendant's apartments, and which did so, not from any neglect by him to make such repairs as were incumbent upon him, but from the defective condition of the general plumbing work of the house. The physician attributed the illness of defendant's wife as well as of two of his servants to what he described as "bad hygienic surroundings and bad drainage." He said that the situation of the apartments was good, and that there was sufficient cold fresh air in

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the water closet, but it was, he said, the bad hygienic surroundings, by which, he said, he meant that the sewer gas was not properly carried off, and came back into the house. He testified that when he examined the trap in the house, during his second visit in May, he smelt a very bad odor, as if the sewerage was not carried off. He came to this conclusion, he said, after he had investigated all the causes that might produce malarial fever and sore throat of the defendant's wife, and the malignant sore throat of one of the servants. Having come to this conclusion, the physician sent a note to the board of health, in consequence of which a physician, Dr. Nevlis, was sent by the board to examine the house, who found, as he said, that there was no inlet air pipe, and no main house traps or sewer fixtures, and no proper ventilation to prevent siphonage and suction from the traps; siphonage being described by the witness as "the exhaustion or suction of water from a trap, leaving it unsealed by the water, and permitting the sewer gas to pass into the rooms the same as if the trap were lying open." The tendency, he said, from the want of what he called "back airing in the general arrangement of the plumbing of the house" would be for the gas to generate in the sewer and pass in the pipes through the building, and, in case any defect existed, into the rooms, and he considered the manner of the construction of the pipes dangerous, as it might tend to produce siphonage.

An order was made by the board of health requiring the landlord to have certain changes made in the general plumbing work of the house, among which he was directed to ventilate and complete the trap of the basins in the apartments occupied by the defendant, which were required to be ventilated above the house by a two-inch pipe extending two feet above the roof. This order was made about the middle of May, but nothing was done by the landlord, and on the last of May, two weeks after the order was given, the defendant removed from the apartments.

On the twenty-second of June, more than a month after the

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order was given, the board of health sent an inspector to the flats to see if the order had been obeyed, who reported that none of the details or requirements had been complied with, and it was not until some time in July, after a second inspection, that a report was made that the order of the board of health had been complied with.

The plaintiff called as witnesses an architect, a plumber, a physician and the janitor of the building, who controverted the testimony of the witnesses of the defendant in many substantial particulars; but we must assume, upon all questions of fact upon which there was any conflict, that the jury from their verdict believed the witnesses of the defendant. We must assume, therefore, upon the testimony of the defendant's witnesses, that the illness of the defendant's wife and servants was due to a malarial or poisonous gas in the apartments occupied by them; and that this unhealthy condition of the apartments was owing to the defective condition of the general plumbing work of the house, of which the landlord was fully notified by the orders he received from the board of health, and which could have been removed if he had complied with those orders, as he was bound to do. That the defendant waited for two weeks, and finding that nothing was done on the part of the landlord, that he left under the justifiable apprehension that he was imperiling the health and possibly the life of himself and his family by remaining.

This state of facts established a constructive eviction. If a tenant is deprived, by the wrongful act of the landlord, of the beneficial use of the premises, and is compelled thereby to quit and abandon them, it amounts to what has been called a constructive eviction, and the tenant is thereafter relieved from the payment of rent (*Dyett* agt. *Pendleton*, 4 *Cow.*, 501; 8 *id.*, 727; *Edgerton* agt. *Paige*, 1 *Hilt.*, 320; *Id.*, 20 *N. Y.*, 221; *Cohen* agt. *Dupont*, 1 *Sand.*, 260; *Halligan* agt. *Wade*, 21 *Ill.*, 470; *Preston* agt. *Jones*, 2 *Tred. Eq.*, 350; 6 *Bac. Abr. Rent, L.*, 44; *Taylor's Landlord and Tenant*, 378).

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The unhealthy and perilous condition of the apartments occupied by the defendant, and the landlord's neglect for two weeks to do what the board of health required him to do, was, in my opinion, as good a ground for the defendant's quitting the apartments, after he had waited for a fortnight for the landlord to comply with the order of the board of health, as the landlord bringing lewd women upon the premises, as in *Dyett agt. Pendleton (supra)*, or the landlord or his family constantly muffling the defendant's door bell so as to prevent his knowing when visitors called upon him, as in *Cohen agt. Dupont (supra)*.

The first case was an act of immorality on the part of the landlord, the second an unjustifiable annoyance of the defendant in his business as a dentist, and the wrongful act of the landlord in the present case was compelling the tenant to occupy the premises at the peril of his health, and possibly of his life, by neglecting to do what the landlord was ordered to do by the public authorities, and which it was incumbent upon him to set out about doing at once if he expected his tenant to remain in the premises. Having remained there a fortnight afterwards and nothing being done the defendant, in my opinion, was justified in quitting and abandoning the apartments; and being abandoned under such a state of facts it amounts in law to a constructive eviction as fully, in my judgment, as did the facts in the cases above cited.

The question in the case was fairly put to the jury by the judge. He said that if the illness of the defendant's wife was caused by the unhealthy sanitary condition of the house, which was not a new escape of sewer gas, but the result of a defect in the construction which rendered the escape of gas in the closet a permanent thing, so that the apartments became unfit for occupancy and dangerous to life, that the defendant had a right to remove from the apartments, and was thereafter discharged from the payment of rent; that the question, therefore, upon the evidence was whether there had been such a constructive eviction and prevention of the free enjoyment of

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the apartments as to relieve the defendant from paying rent for them.

The jury found that there was, and I think that the judgment entered upon the verdict should be affirmed.

LARREMORE, *J.* — Legislative enactments have repeatedly narrowed and controlled the conventional relation of landlord and tenant as established by the common law. Prominent as a subject of recent consideration is that of "hygiene," which seems to imply that all premises that are demised should be in a healthful condition. A board of health in this city supervises and directs action in this respect, and courts of justice cannot ignore its action. Whatever, under its direction, conduces to public health and safety must be regarded as a necessary police regulation and enforced accordingly.

In this case the verdict of a jury has established the fact of a constructive eviction of the premises in dispute, and, notwithstanding the doubt of the learned appellate court of the first instance as to the rule of law, I incline to the belief that cases of this character must hereafter be decided upon the distinctive facts as presented by the whole evidence in each particular case.

I find no reason to disturb the verdict of the jury, and think the judgment appealed from should be affirmed, with costs.

BEACH, *J. (dissenting)* — There seems to be no support for this judgment in legal principle. The defendant has occupied the premises and taken a new lease. He moved out before the expiration of the term, and defends this action for rent, because the premises were rendered untenable from sewer gas.

There was no implied warranty by the landlord that these premises were tenantable. The principle has been so often adjudicated as to render useless any citations of authority. The record contains no evidence of any fraud by the landlord by way of inducing the leasing, and the case is conceded not to be within any provision of the act of 1860. Neither is the

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landlord shown to have created any nuisance adjacent to the demised premises, or done any act preventing the tenant from an enjoyment of possession (*Dyett* agt. *Pendleton*, 8 *Cow.*, 728; *Edgerton* agt. *Paige*, 1 *Hilt.*, 320; *Id.*, 20 *N. Y.*, 281; *Cleves* agt. *Willoughby*, 7 *Hill*, 83).

The presence of sewer gas in the demised premises does not of itself constitute an eviction, and it is no defense to an action to enforce payment of rent. The landlord is not, from its prevalence, connected with or responsible for its entry or continuance.

The reasoning of the learned justice in *Sutphen* agt. *Seabass* (*May general term*, 1883) is applicable to this case. In *Francke* agt. *Newmans* (17 *Week. Dig.*, 252), the decision seems to have been founded on the act of 1860. Justice BRADY says: "It is not necessary, therefore, to sustain the judgment in this case, to resort to any other act than that after tenancy commenced there was such a change, according to the testimony on the part of the plaintiffs, in the condition of the cellar that the house became untenable, and for this reason, as already suggested, the statute of 1860 applied, and the tenant had a right to abandon the premises."

Since the decision of this appeal by the general term of the city court, the subject has again been before that tribunal. The learned opinion of justice HAWES, in *Chadwick* agt. *Woodward*, present an extended review of the authorities and renders further elaboration needless. The conclusion reached by the learned justice is unassailable, in my opinion, and accords with the law I have briefly stated.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

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Robins agt. McClure.

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## SUPREME COURT.

WRIGHT ROBINS agt. JOHN MCCLURE, in person and as executor of the last will and testament of CAROLINE MCCLURE, deceased.

*Will — Distribution — Husband and wife — Administration by husband — Lapsed legacy.*

The testatrix, who left no descendants, by her will gave her husband certain property and one-half of the remainder of her estate, giving the other half to a brother and sister in equal shares:

*Held*, that the share of the brother, who died before the testatrix, belongs to the husband and not to the brother's heirs-at-law,

*Special Term, February, 1884.*

*Edward James*, for plaintiff.

*J. N. Peckett*, for defendant.

LAWRENCE, J. — Caroline McClure died in the month of November, 1882, having made her last will and testament, which was thereafter proved in the surrogate's court of this county as a will of real and personal estate, and letters testamentary thereon were issued by the surrogate to John McClure, her husband, one of the executors named in said will, who duly qualified and entered upon his duties as such executor. The testatrix left no descendant or ancestor surviving. She left but one piece of real estate, being the house known as No. 360 West Thirty-third street, in this city, which she devised to her husband. By her will the testatrix gave to her husband all the household furniture and effects contained in said house, and also devised and bequeathed to him the one-half part of all the remainder of her estate, both real and personal, absolutely. The controversy involved in this suit arises under the fifth clause of the will of said Caroline McClure, which is as follows: "I give, devise and

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bequeath the remainder of my estate, both real and personal, to my brother Wright Robins, and to my sister Mrs. Elizabeth Carter, to be equally divided between them, and to have and to hold unto them, their heirs and assigns, forever."

Elizabeth Carter survived her sister, but the brother Wright Robins, named in said will, died before her. The plaintiff in this action is a nephew of the testatrix. She also left certain nephews and one grandniece, the heirs-at-law of her five brothers, Isaac Robins, Amos Robins, Nathan Robins, Wright Robins and George W. Robins. It is alleged in the complaint that John S. McClure, the husband of the said testatrix, has taken possession of all the estate of said testatrix, both real and personal, and claims to hold the same in his own right adversely to the said heirs-at-law and next of kin, not only those parts of said estate which are devised and bequeathed to him by said will, but also all that portion of the remainder of said estate which was devised and bequeathed by said will to Wright Robins, the deceased brother of said testatrix.

The plaintiff claims that by reason of the death of said Wright Robins in the lifetime of said testatrix, the provisions made in said will in his favor lapsed, and that upon the death of said testatrix her heirs-at-law became and are seized of the real estate devised to said Wright Robins as tenants in common in fee simple, and that her next of kin—to wit, the parties hereinbefore mentioned—became and are entitled to the personal estate bequeathed to said Wright Robins, and are entitled to a distribution of the same among them, under the statute of distributions, and that the defendant holds the same in trust for them as such executor as aforesaid. It is also alleged that the plaintiff brings this action, not only in his own behalf, but for the benefit of all such heirs-at-law and next of kin who may come in and contribute to the expenses thereof.

The defendant in his answer admits that he has taken possession of all the estate of said testatrix, both real and

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personal, but denies that he claims to hold the same in his own right, and denies that he holds adversely to the said heirs-at-law and next of kin, not only those parts of said estate which are devised and bequeathed to him by said will, but also of that portion of the remainder of said estate which was devised and bequeathed to Wright Robins, the deceased brother of said testatrix, but alleges that he holds said estate as executor, under said will, to carry into effect the provisions of said will, and as legatee and heir-at-law of his wife, the said testatrix. He also alleges that under the provisions of the will, he is the owner absolutely in fee simple of the house and lot No. 360 West Thirty-third street, in the city of New York, and that as the testatrix left no descendants, the portion or share devised to the said Wright Robins, deceased, became, belongs absolutely to, and is the property of this defendant, as the husband of said testatrix.

On the trial it appeared that the provision of the will devising the dwelling-house was interlined before its execution at the request and by the direction of the testatrix, and as that was the only real estate belonging to the testatrix no question arises as to said real estate. The plaintiff contends that the portion of the estate of Caroline McClure which was bequeathed to Wright Robbins having lapsed, the husband cannot avail himself of the provisions of the will which are in his favor and yet claim to be entitled, as the husband, to that portion of the estate which would have gone to Wright Robins in case he had survived his sister, and that, therefore, her heirs-at-law or next of kin are entitled to the same.

It was held by the court of appeals, in the case of *Barnes* agt. *Underwood* (47 N.Y., 351), that the common-law right of a husband to administration, and, through administration, to acquire title to the personal property of his deceased wife not reduced to possession during coverture, subject only to the payment of her debts, was preserved by the Revised Statutes, and have not been affected by the statutes of 1848 and 1849, in relation to married women. That those statutes give the

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wife control of her separate estate, with power of testamentary disposition during her life, but that if she dies intestate, the rights of her husband as her successor are not affected, and that he is not prevented from the administration and consequent enjoyment of the property. It was also held that the amendment to the seventy-ninth section of the statute of distributions in 1867 did not affect the right of the husband to administration and enjoyment of the deceased wife's personal estate, except in the case therein specified, to wit, of her dying leaving descendants. In this case the wife, as we have seen, left no descendants, the parties claimed to be her heirs-at-law and next of kin being her sister, Elizabeth Carter, named in said will, and the descendants of her deceased brothers.

The precise question presented in this case did not arise in the case of *Barnes* agt. *Underwood*, because there the wife died intestate and her husband was appointed as her administrator; but the reasoning of the court in that case goes far to sustain the position taken by the defendant in this case. But in *Fry* agt. *Smith* (10 *Abb. N. C.*, 224) Mr. justice VAN VORST had under consideration a case which was exactly similar to the case at bar. In that case Mrs. Godon, after making some inconsiderable bequests by her will, directed that "all the remainder of my estate, real and personal, I give, devise and bequeath to my husband, Sylvanus William Godon, and at his death to go to my son, Frederick William Godon and to his natural heirs." She died possessed of personal property, and before her death her son Frederick William died, without issue and unmarried. The testatrix left her surviving her husband and no issue, and the learned justice held that the common law right of the husband to take the entire personal estate of the wife dying intestate and without descendants, extended to the partial intestacy created by the lapse of the legacy to the son, although the husband had taken letters testamentary under the will, but had never taken out letters of administration upon the wife's estate.

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I cannot add anything to the elaborate opinion of the learned justice, and concurring as I do in the views which he therein expressed, I shall hold that the husband in this case is entitled to that portion of his wife's estate bequeathed by her will to her brother Wright Robins, such bequest having lapsed by his death before the death of the testatrix.

On the argument the learned counsel for the plaintiff referred me to the case of *Kearney agt. Missionary Society of St. Paul, the Apostle* (reported in 10 Abb. N. C., at page 274), which was also decided by Mr. justice VAN VORST, and claimed that the decision in the latter case was antagonistic to the decision in *Fry agt. Smith*. The learned justice refers to that case in his opinion in the case of *Fry agt. Smith*, and states as follows: "That case differs essentially from the present one in its facts. I do not think that it upholds the plaintiff's propositions, but if it announces doctrines in opposition to the conclusions reached in this case, to that extent it cannot be followed." This is a clear indication that the learned justice did not consider the case of *Kearney agt. Missionary Society* as conflicting with his decision in the case of *Fry agt. Smith*. In this view I also concur, but if there were any doubt upon this point, deeming as I do that the decision in *Fry agt. Smith* is a correct exposition of the law upon this subject, I should feel bound to follow the latter case.

For these reasons I am of the opinion that the defendant is entitled to judgment declaring that the title and ownership of the property bequeathed to Wright Robins, deceased, by the will of Caroline McClure, belongs to the defendant as the husband of said testatrix; that the house and lot No. 360 West Thirty-third street belongs absolutely in fee simple to the defendant; and that after paying the other legacies named in the will, all the rest, residue and remainder of the testatrix's estate belongs to the defendant.

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Hart agt. Townsend.

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## SUPREME COURT.

JOSEPH HART agt. GEORGE ALFRED TOWNSEND.

*Libel — Matter which is defamatory — Evidence — Newspapers — Justification that the words are true — Qualifiedly privileged cases — Correspondent of newspaper — Proof of malice required — Damages — Question for jury.*

In an action of libel brought by plaintiff, the publisher of a newspaper in the city of New York called "Truth," against defendant, who was a regular correspondent of the "Cincinnati Enquirer." The complaint was that he, defendant, wrote and published concerning him and the newspaper the following matter: "The newspaper 'Truth' is alleged to have been started for the purposes of plunder:"

*Held, first*, that the matter is in itself defamatory, and unless its publication was justified it is actionable.

*Second*. The motive which inspired the foundation of a newspaper can be well shown by its own columns as they speak from day to day.

*Third*. The official conduct of men in public life, and the fitness and claims of candidates for official station, are fair subjects for review and criticism in the public prints, and such honest criticism, although it be unfriendly and severe, can give no occasion for the suggestion that it proceeds from unworthy or indirect motives. An independent press may feel constrained under a sense of duty to discuss such matters at times with honest plainness, but assaults upon private persons and character are not shielded by the rule which allows publishers of newspapers to review, criticise and energetically oppose the public action of men in official station, or those who are seeking it.

*Fourth*. If the words published by the defendant are true under the evidence then the defendant's justification is established, otherwise not.

*Fifth*. If the work of this defendant in preparing and publishing this communication, including the matter complained of, was in good faith done, and in the honest belief that it was true in statement and comment, and without any indirect motive to injure the plaintiff or the newspaper in question, or ill-will toward him or it (and of this the jury are the judges), then it falls within the class of cases qualifiedly privileged and the defendant is entitled to the immunity from liability which such privilege confers, although the matter complained of be not true.

But this privilege accorded to journalists and regular correspondents of the press in writing, and commenting upon current public affairs and matters is not to be abused by using it intemperately or recklessly as an instrument to injure individuals or substantial interests, through

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statements or inferences maliciously made, justified neither by the facts nor the occasion.

Every defamatory article in itself contains evidence of malice. Such malice the law implies, and that without any extrinsic proof; but where the conclusion is reached that the communication was qualifiedly privileged on account of the subject, the occasion and the duty, then proof of actual malice is required in order to justify a verdict.

The amount of damages in actions of this character is within the control of the jury under all the facts and circumstances as detailed by the evidence. But when the action is not by the proprietors of a newspaper itself for injury to it, but by a plaintiff who claims to have been the starter, or one of the starters, of the paper, and one of the owners and publishers thereof, and that he has sustained damages by the publication of the article complained of, the damages sustained by the paper itself as such cannot be recovered by him, but only such as he has personally sustained by reason of his connection with the paper in the relations above mentioned.

*N. Y. Circuit, February, 1884.*

THIS was an action of libel tried before judge VAN VORST and a jury, at a circuit held in New York, February, 1884.

The plaintiff, the publisher of a newspaper in the city of New York called "Truth," sued the defendant for an article written by him and published in the "Cincinnati Enquirer," which plaintiff claimed to be libelous. The defendant was a regular correspondent of the "Cincinnati Enquirer." The matter claimed to be libelous appears in the charge of the court. The plaintiff claimed \$20,000 damages. The judge's charge is given below.

*Richard S. Newcombe, for plaintiff.*

*John D. Townsend, for defendant.*

VAN VORST, J.—The plaintiff claims to have been one of the starters and the publisher of the newspaper called "Truth." His true relation to the paper appears by the evidence. His complaint against the defendant is that the defendant wrote and published concerning him and the newspaper "Truth" the fol-

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lowing matter: "The newspaper 'Truth' is alleged to have been started for the purposes of plunder." There is no occasion for me to explain these words. Their meaning is obvious. They speak for themselves. By this publication the plaintiff claims to have been damaged, and he seeks redress in this action. It is for you to determine whether or not the plaintiff is entitled to recover, and if so, the amount of his damage. The matter of which complaint is made is, in itself, defamatory, and, unless its publication was justified, actionable. The defendant admits that he published these words, and by his answer to the complaint, says that they were and are true, according to the true intent and meaning thereof. The question which you are called upon to consider and decide under this defense is: were these words true? Was this newspaper, under the evidence detailed before you, started for the purpose of plunder? Evidence has been adduced before you as to the origin of this paper; by whom, and under what circumstances, means and auspices the enterprise was launched, and how it was afterwards conducted. Do they establish that the paper was started for the purposes indicated in the defendant's article? Was it to be used as an instrument of plunder? If it was, your verdict should be for the defendant. Whether a newspaper was originally started for the purpose of plunder, may be shown by its columns and its conduct. The principle upon which a man's life rests, and by which he is controlled, is shown by his general behavior. We have no other means of judging a man's motive than as it is expressed in his speech and action; and the motive which inspired the foundation of a newspaper, can be well shown by its own columns, as they speak from day to day. Much matter has been read to you from the newspaper in question. I do not propose to allude to these articles in detail. You will recall them at once. They relate to individuals, to men in public station as also to those in private life, to institutions and to matters of both public and private concern. Evidence has been given of personal interviews and

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transactions between the managers and agents of this newspaper and individuals, and now the question is, does this evidence establish that this paper was started for the purpose imputed to it by the defendant? The official conduct of men in public life, and the fitness and claims of candidates for official station are fair subjects for review and criticism in the public prints, and such honest criticism, although it be unfriendly and severe, can give no occasion for the suggestion that it proceeds from unworthy or indirect motives. An independent press may feel constrained, under a sense of duty, to discuss such matters at times with honest plainness, but assaults upon private persons and character are not shielded by the rule which allows publishers of newspapers to review, criticise and energetically oppose the public action of men in official station or those who are seeking it.

You are carefully to consider the quality of these articles which have been read in your hearing from the newspaper "Truth," and you are to determine whether they establish the defense that this paper was started for the purposes of plunder. You should also determine whether or not the evidence of the dealings and transactions of the persons in charge of this paper with individuals or organizations, private or political, show such to have been the purposes of this paper. Much attention has been given in this connection, by the counsel, to the so-called "*Morey letter*," admitted upon this trial by all to have been a forgery. The manner in which this letter was received, its publication by the newspaper "Truth," the denial of its genuineness by General Garfield, and the after-conduct of the proprietors of the paper upon the subject, are all before you. I shall not allude to the various steps taken, nor to the action of these parties, in detail, in respect to this letter and its treatment by the newspaper in question. The evidence is all before you. You will, doubtless, recall and judge it; will determine its true character and what it establishes. You will decide what bearing this subject has upon the issue before you. Whether, on the one hand, the publi-

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cation of this letter, under the circumstances, as genuine, and the subsequent action of the managers of the newspaper, in relation thereto, was honestly and in good faith made and carried on ; or, on the other hand, whether they tend to establish the truthfulness of that part of the defendant's communication to the "Cincinnati Enquirer," of which complaint is here made. Of this particular subject, as well as the others arising from the evidence, which involve matters of fact, you are the exclusive judges, and it is for you to say whether this defense has been proven.

I have already said to you, and I now repeat it, that if the words published by the defendant are true under the evidence, then the defendant's justification is established ; otherwise, not ; and you may consider the whole article of the 12th of November, 1880, in determining both the mind of the defendant in writing it, and the defense interposed by him, which we have just been considering. But in the event that you shall find that these words were not true, then it will be your duty to consider another defense interposed by this defendant, which is in substance that the communication to the public, made by the defendant, of which the matter complained of formed a part, was qualifiedly privileged. That is substantially another defense. Under this head, and I beg to call your particular attention to these suggestions, it appears that the defendant is by profession an author and a writer for periodicals and newspapers. He was the regular correspondent of a newspaper published in the city of Cincinnati called the "Cincinnati Enquirer," and his employment, in part, was to write of events transpiring in New York city, and to give information concerning them through its columns by letter or telegraph. A communication made by the defendant to the paper on the 12th day of November, 1880, in the way of his employment and duty, contains the matter of which complaint is made in this action. The Cincinnati paper published it on the following day, the thirteenth of November. If the work of this defendant in preparing and publishing this communica-

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tion, including the matter complained of, was in good faith done, and in the honest belief that it was true in statement and comment, and without any indirect motive to injure the plaintiff or the newspaper in question, or ill-will toward him or it, and of this you are the judges, then it falls within the class of cases qualifiedly privileged, and the defendant is entitled to the immunity from liability which such privilege confers, although the matter complained of be not true. The conduct of newspapers and their managers in their treatment through their columns of men and things, is open to criticism and review by other journalists and their regular correspondents. Of the duty of the press to expose fraud and crime and to condemn it, there can be no question. The communication of the twelfth of November, written by the defendant, is largely devoted to the action of the newspaper "Truth" and its publishers, concerning the publication of the so-called "*Morey letter*," and the proceedings taken to detect and to punish the persons engaged in that forgery. Now, that was a matter of public concern and entirely proper for statement and fair and reasonable comment and inference in the public press. To that extent, the communication of the defendant, a public writer, was, if made by him, believing it to be true, under all the facts and circumstances concerning it, and without malice, qualifiedly privileged: But this privilege accorded to journalists and regular correspondents of the press, in writing and commenting upon current public affairs and matters, is not to be abused by using it intemperately or recklessly as an instrument to injure individuals or substantial interests, through statements or inferences maliciously made, justified neither by the facts nor the occasion. The question arises, and which you are now to consider: Did the defendant abuse the privilege extended to him as a correspondent of the Cincinnati newspaper, and did he use the occasion as a means of gratifying a feeling of malice towards the plaintiff or the newspaper with which he was connected, by alleging that it was started for the purposes of fraud? If he did, then the

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quality of privilege is lost and he is liable to damages. Every defamatory article in itself contains evidence of malice. Such malice the law implies, and that without any extrinsic proof, but when the conclusion is reached, as it is in this case, that the communication of the defendant was qualifiedly privileged on account of the subject, the occasion and the duty, then proof of actual malice is required in order to justify a verdict for the plaintiff for the use by the defendant of the words complained of. Therefore, gentlemen, although you should find that the words of which complaint is made are not true, still, in order to justify a verdict for the plaintiff, you are to be satisfied from the evidence that the imputation contained in the defendant's communication concerning the newspaper "Truth" was not a reasonable inference from the facts appearing in evidence, and that the defendant used the occasion and wrote the words complained of from a wrong motive and to gratify ill-feeling toward the plaintiff or his newspaper; and this state of mind must be affirmatively proven by the plaintiff, or he cannot recover.

The only remaining subject is one of damages, but that subject need only be considered in the event that the previous issues are decided in the plaintiff's favor. The amount of damages in actions of this character is within the control of the jury under all the facts and circumstances in evidence. But this is not an action by the proprietors of "Truth" itself for an injury to it, or for damages it has sustained, but by a plaintiff who claims to have been the starter, or one of the starters, of the paper, and one of the owners and the publisher thereof, and that he has sustained damages by the publication of the article. The damages, if any, sustained by the paper itself as such cannot be recovered by him, but only such as he has personally sustained by reason of his connection with the paper in the relations above mentioned. As a matter of course the character of the paper itself may be taken into consideration in this connection. The true character of a newspaper is well shown by the matter which it publishes from day to day.

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That discloses its real worth and mission. Your attention has been called to such matter, and from it you will determine whether the character of the newspaper was generally good or bad, and what damages the plaintiff has sustained through his connection with it by occasion of the publication of the matter by the defendant, of which complaint is made. Of this you are the judges under the evidence.

The jury brought in a verdict for fifty dollars damages.

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N. Y. SUPERIOR COURT.

THE NORTHAMPTON NATIONAL BANK agt. AMOS M. KIDDER  
and others.

*Stolen negotiable bonds—Possession does not create presumption of ownership—  
Rule as to presumption reversed in such cases—Burden of proof.*

Antecedent consideration is not sufficient to enable the holder of stolen negotiable bonds to hold them against the loser and owner before the robbery.

Possession does not create a presumption of ownership in the case of negotiable paper shown to have been stolen. The robbery reverses the usual rule as to the presumption. The holder after the robbery has the burden on him to prove value paid and parted with contemporaneously, good faith, purchase before maturity, &c. (*Wylie agt. Speyer*, 62 *Howard*, 110, *approved*.)

When a verdict is rendered subject to the opinion of the court at general term, the whole case is before the general term on its merits, and no new trial can be ordered.

*General Term, November, 1883.*

ACTION in trover against the defendants, brokers and members of the stocks exchange, for the value of certain negotiable bonds stolen from the plaintiffs' vaults by masked burglars and afterwards bought and sold by the defendants. The bonds contained a covenant making the principal due, in case of default in the interest coupons, or of default in the stipu-

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lated payments to the sinking fund. Such defaults had occurred for a long period. A foreclosure suit on the bonds had been brought and the road was still in the hands of a receiver. Plaintiff also made a claim by reason of the defaulted coupons going with some of the bonds and other alleged circumstantial notice. At the close of the evidence at trial, both sides withdrew their exceptions, and the chief judge directed a verdict for plaintiff (subject to the opinion of the general term), basing his decision mainly on the plaintiff's claim that the technical maturity of the bonds by the defaults made the bonds dishonored paper.

*W. G. Peckham* and *E. W. Tyler*, for plaintiff. The burden of proof is all on defendants after we prove loss by robbery, and the case can rest on this alone (*Nat. Bank of Courtlandt* agt. *Green*, 43 *N. Y.*, 298; *Kuhns* agt. *Gettysburg Nat. Bank*, 68 *Penn.*, 445; *Bank of North Am.* agt. *Kirby*, 108 *Mass.*, 497). Waiver of the defaults on our part is not proven and cannot be presumed (*Ragan* agt. *Day*, 46 *Iowa*, 239; *Penn. Hosp.* agt. *Gibson*, 2 *Mills*, 326). The verdict is to be upheld on any theory sustainable on the facts (21 *N. Y.*, 490). It is axiomatic that overdue paper is non-negotiable (*Vermilye* agt. *Adams Exp.*, 21 *Wall.*, 138; *People* agt. *Superior Ct.*, 19 *Wend.*, 109). This condition broken, the paper is overdue (*Daniel Neg. Ins.*, sec. 1506, a). The other taints on the paper entitle us to recover also (*First Nat. Bank* agt. *County Court*, 14 *Minn.*, 78). Defendants claim, as to the burden of proof, shows that it was not by surprise that he neglected to prove values, &c. Failure of proof and defect of proof are questions of law.

*W. M. Safford* and *M. Williams*, for defendant. The burden is on plaintiff to prove *mala fides* in defendant (*Seybel* agt. *Currency Bank*, 54 *N. Y.*, 288; *Welch* agt. *Sage*, 47 *N. Y.*, 143; *Mut. Ins. Co.* agt. *Hatchfield*, 73 *N. Y.*, 226; *Murray* agt. *Gardner*, 2 *Wall.*, 110.) The default of the

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coupons did not make the principal due (*Cromwell* agt. *County of Sac*, 96 U. S., 51; *Railway Co.* agt. *Sprague*, 103 U. S., 756). Receipt of interest on later coupons was a waiver of default (*Sire* agt. *Weightman*, 25 N. J., 103; *Conkling* agt. *King*, 10 N. Y., 440). The burden of proof is not on the defendant to prove value or *bona fides* (*Goodman* agt. *Simons*, 20 How. U. S., 343). *Bona fides* was a question for the jury.

INGRAHAM, J.—This action was brought to recover for the conversion of certain consolidated second mortgage bonds of the Ohio and Missouri Railway Company.

It appears that prior to the 9th of January, 1876, the bonds in question were the property and in the possession of the plaintiffs, a national bank doing business at Northampton in the state of Massachusetts, and that on the 9th of January, 1876, plaintiff was robbed of a large amount of property including the bonds in question; that at the time of the robbery the said bonds were not in default but interest had been regularly paid thereon; that the coupons that become due on the 1st of October, 1877, were not paid, and had not been paid up to the time of the trial; that on the 28th of April, 1881, defendant purchased the said bonds in the regular course of business at the New York Stock Exchange from Lucien H. Niles, a member of the exchange in good standing, and paid therefor. It does not appear, however, what consideration was paid or whether or not any money was actually paid *by defendants* for the bonds. At the close of the testimony plaintiff requested the court to direct a verdict in favor of the plaintiff. The defendant also requested the court to direct a verdict for the defendant. Neither party requested the court to submit any questions to the jury and the case must be treated as a question of law, on the facts proved—that the bonds in question were negotiable instruments and possessed all the qualities and attributes of such obligations is well settled. (*Gilpike* agt. *City of Dubuque*, 1 Wall., 206; *Murray* agt. *Lardney*, 2 id., 113.)

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It is also well settled that the possession and production of a negotiable instrument is *prima facie* evidence of title (*Mechanics and Traders' Bank* agt. *Crow*, 60 *N. Y.*, 87; *Murray* agt. *Lardney*, *supra*). Plaintiff to rebut such presumptions proved on the trial that the bonds were stolen from the bank in January, 1876. The burden of proof was then changed, and the defendants to sustain their title to the bonds were then required to show under what circumstances and for what value they became the holders (1 *Daniel Neg. Ins.*, sec. 166). In other words, in order to overcome plaintiff's title it was necessary for defendants to prove that they purchased the bonds before maturity, and paid for them a valuable consideration. As a leading English case on this question says: "Where a note is proved to have been obtained by fraud that affords a presumption that the person who is guilty will dispose of it, and would place it in the hands of another person to sue upon it," such presumption operates against the holder, and it devolves upon him to show that he gave value for it (*Binby* agt. *Bidwell*, 13 *Mees. & Wes.*, 73, *cited and approved in First National Bank* agt. *Green*, 43 *N. Y.*, 300; *Porter* agt. *Knapp*, 6 *Lans.*, 127). If defendants failed to prove that they paid a valuable consideration for the bonds plaintiff was entitled to a verdict.

After a careful examination of the evidence I have been unable to discover any proof that defendant paid a valuable consideration for the bonds. The only evidence in relation to the purchase of the bonds by the defendants is that given by the defendant Morse. He was first called as a witness for the plaintiff, and on his redirect-examination, at folio 49, he first speaks of the purchase of the bonds; "that it was in 1881 that we (defendants) paid for the bonds;" and then, at folio 50, "we bought these bonds on April 28, 1881." After plaintiffs rested Morse was recalled. He again stated that he bought the bonds on the 28th of April, 1881. On cross-examination he said he could not swear that he in person bought the bonds, but he knew that the firm purchased them, and finally said,

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"I would swear that we bought these bonds, paid such a price for them, and received them on a given day."

In my opinion this was not evidence that the defendants paid a valuable consideration for the bonds. It would be true if the defendants had taken the bonds for an antecedent debt they would then have "purchased" the bonds and paid for them, yet it is well settled that such payment of a consideration would not overcome plaintiff's title and make defendants holders for value (*Phoenix Insurance Co. agt. Clark*, 81 N. Y., 221).

The court of appeals, in the case of *First National Bank agt. Green* (43 N. Y., 300), held that "a plaintiff suing upon a negotiable note or bill purchased before maturity is presumed in the first instance to be a *bona fide* holder. But where the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder."

In *Ocean National Bank agt. Carll* (55 N. Y., 440) the point was whether plaintiff had failed to prove he was a *bona fide* holder of the note, upon which the action was brought for value, and the court of appeals reversed a judgment for plaintiff, on the ground that the witness who had testified that the note in suit was discounted and that a check produced was given for the avails, made the statement from books and papers, and not from their personal knowledge. In this case the evidence was uncontradicted that the note was in possession of the plaintiff before maturity, but the court held this was not sufficient. The consideration must be shown.

In *Wylie agt. Speyer* (62 How., 110) judge VAN VORST, in an action to recover some coupon bonds, stolen from the vaults of the plaintiff, says: "The plaintiff's title is made out by showing the fact of original ownership, and that the property had been stolen; if they reached the hands of *bona fide* purchasers before maturity, through whom the defendants claim, they must show it." We think upon principle and

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authority this to be the true rule. In the case at bar, defendants did not show that they paid any valuable consideration for the bonds, and not having brought themselves within the rule cannot hold the bonds as against the plaintiff.

Many cases could be cited to sustain this proposition, but we think the foregoing are sufficient. Defendants claimed on the argument, and cited many cases to sustain their contentions, that the production of the bonds threw the burden of proving that the defendants did not pay a valuable consideration on the plaintiff. We have examined the cases cited but do not think they are authorities for the defendants.

Defendants also insisted that the court should assume that the plaintiff did not, on the trial, raise the point defendants had not paid a valuable consideration for the bonds. It nowhere appears that both the court and counsel assumed that defendants were *bona fide* purchasers for value. But from all that appears it may be assumed that defendants vested their claim, at the trial, as they did on the argument on appeal, on the proposition that the possession of the bonds was presumptive evidence of title in the holder, and the burden of proof was upon the person asserting such title, to show he was not such a *bona fide* holder. This position, as before stated, we do not consider to be well taken. But in no case cited did the appellate court assume a fact to exist for the purpose of reversing a judgment, and in order to set aside a verdict and direct a verdict for the defendants, it would be necessary for the court to assume, in this case, that defendants paid a valuable consideration for the bonds in question, of which, as before stated, there was no proof.

If defendants purchased the bonds in good faith and paid value for them, there could have been no difficulty in their proving such payment, and having failed to give any evidence which would sustain a verdict in their favor, we think the court below was right in directing a verdict for the plaintiff. Where a verdict is rendered subject to the opinion of the court at general term, the whole case is before the general

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term on its merits, and no new trial can be ordered (*Durant* agt. *Abendroth*, 69 *N. Y.*, 150). It follows, therefore, that defendants have failed in their defense, and judgment must be ordered in favor of the plaintiff on the verdict, with costs. Verdict affirmed.

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## N. Y. COMMON PLEAS.

BRADFORD OTIS agt. JAMES SELIGMAN *et al.*

*Complaint — Demurrer — Defect of parties — Improper joinder of actions — All tort feasons not necessary parties.*

The complaint alleged that A. delivered to B. jewelers' sweepings worth \$4,292 to be refined, for which refining A. was to receive \$320, and that B. subsequently assigned to defendants all his plant, &c., including A.'s sweepings, the defendants assuming all the debts and liabilities of B. and taking possession of B.'s property, and judgment is asked for the value of the sweepings less the cost of refining.

*Held* (overruling demurrer to complaint), that defendants having assumed an obligation must be held liable for its consequences; that no issue is presented as to the conversion of property, and if there were the question of the non-joinder of B. is not available, because as joint tort feasons the defendants would be individually liable.

*Special Term, March, 1884.*

THE complaint sets forth the copartnership of the defendants under the firm name of J. & W. Seligman & Co.; that prior to April 15, 1883, John Austin delivered to the firm of Kempf, Nenninger & Co., then doing business as refiners and smelters, 5,820 pounds of jewelers' sweepings to be refined, which assayed sixty-eight pennyweights of gold and silver per 100 pounds, amounting in total value to \$4,292.41, for which refining Austin was to receive \$320.10; that on April 13, 1883, the firm of Kempf, Nenninger & Co. assigned to the defendants all their plant, machinery, fittings, bullion, scraps, waste goods, chattels and materials of every sort, including the sweepings belonging to Austin, or the product

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thereof; that the defendants, in consideration of such assignment, assumed all the debts and liabilities of said firm of Kempf, Nenninger & Co., and especially the claim in dispute, took possession of all its property and thereby became responsible for the contract in controversy; that by its terms the sweepings were to be refined and the product thereof delivered to or accounted for, and the value thereof, less the cost of refining, paid to Austin within twenty days after delivery; that the product of said sweepings has not been returned or accounted for, although twenty days have since elapsed and a demand therefor has been made; that on December 1, 1883, Austin assigned his claim to the plaintiff, who sues for the value of the sweepings, \$3,972.71, less the cost of refining, \$320.10.

The defendants demur to the complaint on three grounds: 1st. Defect of parties in not joining the members of the firm of Kempf, Nenninger & Co. 2d. That an action for tort for the conversion of property and an action for damages for a breach of contract have been improperly united. 3d. That the complaint does not state facts sufficient to constitute a cause of action.

*Jesse W. Lilienthal*, for demurrants.

*J. Langdon Ward*, opposed.

LARREMORE, *J.* — If the plaintiff is entitled to any relief upon the facts stated the demurrer cannot be sustained (*Price* agt. *Brown*, 10 *Abb. N. C.*, 67, and cases cited). The averment that the defendants especially assumed the liability to plaintiff's assignor brings this case clearly within the ruling of *Burr* agt. *Beers* (24 *N. Y.*, 178) and fixes their responsibility. They assumed an obligation and must be held liable for its consequences.

It is evident from an inspection of the complaint that no issue is presented as to the conversion of the property. It is the product of the sweepings "left to be refined" which is the

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subject of the action. The plaintiff seeks not a recovery in kind, but of the value of the property. But in either case his complaint is not defective in form. He has stated the whole transaction and may be required upon the trial to elect upon which ground he will proceed. That he has asked for more relief than he is entitled to cannot prejudice his claim. In either aspect of the case the question of non-joinder is not available. As joint tort feors the defendants would be individually liable (*Creed agt. Hartman*, 29 *N. Y.*, 591). As promissors under the contract of April 13, 1883, they became liable for its performance (*Lawrence agt. Fox*, 20 *N. Y.*, 268; *Arnold agt. Nichols*, 64 *N. Y.*, 117).

The demurrer should be overruled, with leave to answer on payment of costs.

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### N. Y. COMMON PLEAS.

GUSTAV HIRSCHBERG *et al.*, agt. WILLIAM B. DINSMORE, as president of the Adams Express Company.

*Common carriers — Their liability for non-delivery of goods — Condition in receipt that claims for loss should be presented within thirty days — Effect of.*

In an action against a common carrier for conversion, a clause in a shipping receipt containing the condition that "in no event shall the company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing within thirty days after the date of receipt," is available to the carrier, and the presentation of claims for loss within the time specified is a condition precedent to the recovery, and unless complied with, the action against the carrier cannot be sustained.

*General Term, March, 1884.*

APPEAL from judgment of justice of first district court in favor of defendant. The action was for "damages for non-delivery of goods." The facts shown were: On November 4, 1882, at Newark, N. J., one Mercy delivered to defendant's

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express company a package to be shipped to plaintiffs, at New York, and received a receipt which contained the condition that in no event should the company be liable for any loss or damage, unless the claim therefor should be presented to them in writing within thirty days after the date of the receipt, in a statement, to which the receipt should be annexed, that the package was not delivered to the plaintiffs, but, through error, was delivered to some person unknown; that no claim whatever was made on the company within thirty days, but a claim was made some months afterwards, at which time the delivery book of the company (which would show to whom the package had been delivered) had been lost.

*C. Moritz*, for plaintiffs and appellants.

*Blatchford, Seward, Griswold & Dacosta*, for defendant and respondent.

J. F. DALY, *J.* — There was some discussion on the appeal as to whether this action was for breach of contract of the carrier or for conversion, and whether if for conversion the carrier could avail itself of the condition in the contract, providing that the claim for loss must be made within thirty days. The demand, as stated in the return, was for “damages for non-delivery of goods.”

In *Maginn* agt. *Dinsmore* (70 *N. Y.*, 410-17) it was said that a mere non-delivery will not constitute a conversion; and it would seem that the plaintiffs' action is, therefore, stated on the contract. But it is of no consequence what the form of action is since in *Smith* agt. *Dinsmore* (9 *Daly*, 188) we held that in an action for conversion the thirty days' clause in the shipping receipt (which clause was identical with the one now before us) was available to the carrier, that the presentation of claim for loss within the time specified was a condition precedent to recovery, and that unless complied with, the action against the carrier could not be sustained. That case was decided upon another point, but the views expressed in the

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The People *ex rel.* Evans agt. McEwen.

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opinion on the point directly involved in the present case are in conformity with the authorities (*U. S. Express Co. agt. Caldwell*, 21 Wall., 264; *Weir agt. Adams Express Co.*, 5 Phila., 355; *Southern Express Co., agt. Hunnicutt*, 54 Miss., 566; *Lewis agt. Great West. Ry. Co.*, 5 Hurl. & N., 867).

The judgment should be affirmed, with costs.

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## SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD EVANS agt. JOHN McEWEN.

*Commitment — Habeas corpus — Defects in mittimus will not authorize discharge — Judgment of the court and not the mittimus holds the prisoner — Code of Criminal Procedure, sections 722, 724, 725, 471, 717 — Code of Civil Procedure, section 2018.*

The relator, by his counsel, sued out a writ of *habeas corpus* before the recorder of the city of Albany, alleging as a reason for his discharge, that the mandate in the hands of the superintendent of the penitentiary was not a copy of the record of conviction. The return of the defendant sets forth that the relator was detained in the penitentiary by virtue of a warrant, a copy of which was attached to the return, "and, also, by virtue of the judgment of conviction, for the crime of assault in the third degree, by the recorder of the city of Binghamton, in having, on the 8th day of May, 1883, at the city of Binghamton, beaten, struck and assaulted one A. Levine." The return of the defendant was not traversed:

*Held, first*, that upon the return to the writ having been made, the court is to examine into the facts alleged in the return. If there is no traverse of those facts they must be taken as true.

*Held, second*, that the record showed a conviction for a crime by a competent court, and shows that the court had jurisdiction of the person and of the offense charged, and the imposition of a sentence which it had jurisdiction to impose.

*Held, third*, that if the court had jurisdiction of the person and of the offense, no insufficiency of the record in point of form will justify the discharge of the prisoner.

It is not the mittimus that holds the prisoner in custody, but the judgment of the court. A prisoner who has been properly and legally sentenced

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to prison cannot be released, simply because there is an imperfection in what is commonly called the mittimus.

After a plea of guilty, there is nothing further for a court to do than to pronounce sentence. The plea of guilty is like the verdict of guilty. There is no duty in the court "to convict," but only to sentence. When defendant pleads guilty it is not necessary that there should be any conviction.

*People ex rel. agt. Barber* (89 N. Y., 460), which came up from a court of record, *held* to be applicable to conviction in special sessions.

*Third Department, General Term, May, 1884.*

On the 9th day of May, 1883, the relator, Edward Evans, was brought before the recorder of the city of Binghamton charged with having beaten, struck and assaulted one A. Levine, and the charge being read to the relator he then and there pleaded guilty thereto, wherefore he was sentenced to be imprisoned in the Albany penitentiary for the period of six months. On the 16th day of August, 1883, the relator, by his counsel, sued out a writ of *habeas corpus* before the recorder of the city of Albany alleging as a reason for his discharge that the mandate in the hands of the superintendent of the penitentiary was not a copy of the record of conviction. The return of the defendant sets forth that the relator was detained in the penitentiary by virtue of a warrant, a copy of which was attached to the return, "and also by virtue of a judgment of conviction for the crime of assault in the third degree, by the recorder of the city of Binghamton, in having on the 8th day of May, 1883, at the city of Binghamton, beaten, struck and assaulted one A. Levine." The return of the defendant was not traversed. On the twentieth of August the recorder of Albany ordered the discharge of the relator. Upon what ground the order was made does not appear. From that order discharging the relator this appeal is taken.

*D. Cady Herrick*, district attorney, for defendant McEwen.

I. The recorder of the city of Binghamton has power "to try, convict and sentence all persons who may be guilty of any offenses which are or may be triable by courts of special

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sessions" (*Laws* 1867, 291, p. 606, sec. 5; see, also, *Code of Crim. Pro.*, sec. 63). The acts charged against the relator constitute the offense of assault in the third degree (*Penal Code*, sec. 219). Courts of special sessions have jurisdiction over assaults in the third degree (*Code of Crim. Pro.*, sec. 56). The punishment inflicted was within the jurisdiction of the court (*Penal Code*, sec. 222). The prisoner was properly sentenced to the Albany penitentiary. Chapter 399, *Laws* 1869, page 911, authorizes the board of supervisors of Broome county to contract with Albany county for keeping prisoners in the Albany penitentiary. The return shows that such a contract was made.

II. The record thus shows a conviction for a crime by a competent court, and shows that the court had jurisdiction of the person and of the offense charged, and the imposition of a sentence which it had jurisdiction to impose. The return sets forth that the keeper of the penitentiary held the relator "by virtue of a judgment of conviction for assault in the third degree, by the recorder of the city of Binghamton, in having on the 8th day of May, 1883, at the said city of Binghamton, beaten, struck and assaulted one A. Levine." This was not traversed and, therefore, must be taken as true (*Matter of Da Costa*, 1 *Parker C. R.*, 129; *People ex rel. Catlin agt. Neilson*, 16 *Hun*, 214-216). Under the circumstances it was the plain duty of the court below to remand the prisoner. "The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:" \* \* \* "By virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction" (*Code of Civil Pro.*, sec. 2032). The only legitimate inquiry is whether the court had jurisdiction of the person and of the offense. That being so no insufficiency of the record in point of form will justify the discharge of the prisoner (*People ex rel. Catlin agt. Neilson*, 16 *Hun*, 214-217). The petition itself

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sets forth a good and sufficient record of conviction ; it shows a conviction by a court having jurisdiction of the person and of the offense. There was no insufficiency in the record. It was substantially that provided for by section 721, Code of Criminal Procedure. It is also the form specially provided by chapter 291, Laws 1867 (*vol.* 1), page 608, section 7.

III. The only point made in the petition is that the mittimus is not a copy of the record of conviction. It is not the mittimus that holds the prisoner in custody, but the judgment of the court. "A prisoner who has been properly and legally sentenced to prison cannot be released simply because there is an imperfection in what is called a mittimus" (*The People ex rel. agt. Baker*, 89 *N. Y.*, 460-465). In the case at bar, as in the case of Baker above cited, the writ of *habeas corpus* "commanded him to return the cause of his imprisonment and detention." The return shows that it is the judgment of a court that the defendant holds him upon. In fact the petition for the writ shows the same thing. It is the judgment of the court which authorizes the detention, and that can always be shown in justification of the detention" (*People ex rel. agt. Baker*, 89 *N. Y.*, 460-466). If the mittimus had been decided to be insufficient, proof could have been given of the judgment (*See case of Baker, supra*, p. 466). In the case at bar the relator makes that proof himself by furnishing as a part of his petition a certified copy of the record of conviction. The order of the recorder discharging the relator should be reversed and the relator remanded to imprisonment in the penitentiary.

*Galen R. Hitt*, for plaintiff :

I. The recorder of Binghamton had no jurisdiction to try the charge (assault in the third degree) before himself summarily for such offenses by the charter of Binghamton (*sec.* 7, *title* 5, *chap.* 291, *Laws* 1867), and by the Code of Criminal Procedure (*sec.* 56) can only be tried by a court of special sessions, subject to the power of removal, contained in said

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section 56. The charter provides that "the recorder or any justice of the peace acting as such may hear, try and determine in a summary way, any complaint for any violation of the laws of the state or the provisions of title twelve, court of special sessions, or that any act was done or step taken in such a court. It does show that the recorder acted as such summarily; that before him as an individual and not as a justice of the special sessions, the prisoner was brought. As such he stated the charge in open court, and that before him as such recorder the prisoner pleaded guilty. This record being conclusive shows an entire want of jurisdiction.

II. The special law (*charter of Binghamton, sec. 7*) requires that a record of conviction shall be filed with the clerk of Broome county, and is substantially the same as required by section 721 of the Code of Criminal Procedure; and section 722 of the Code provides, "if the defendant had pleaded guilty \* \* \* the certificate must state substantially as follows: 'And the above named A. B. having been thereupon duly convicted upon his plea of guilty.'" Every provision of law requires that a certificate or record shall be filed, and section 724 of the Code provides that such certificate or a certified copy thereof is conclusive evidence of the facts stated therein.

III. The recorder filed a record or certificate, that is, by section 724 of the Code, conclusive evidence of what was done by or before him with reference to the charge against the plaintiff. It fails to show that the prisoner was arraigned before a with an assault, &c. That he pleaded guilty. They then pass to assume that upon such commitment, &c. What connection? They leave out what the law requires shall be in every record or commitment, and what must appear in every case, before a person's liberty can be taken away, viz., an allegation that he was in fact convicted and adjudged to be guilty; a plea is not conviction or acquittal, judgment of conviction proceeds from the court, and is not received by the court from the defendant, and section 722 of the Code is entirely ignored.

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IV. Section 725 of the Code, and that is the only law, special or general, that can be found defining the manner of executing a judgment of these inferior courts, provides that "the judgment must be executed by the sheriff, &c., \* \* \* upon receiving a copy of the certificate prescribed in section 721, certified by the court or county clerk.

V. Now it must clearly appear that the paper returned by the defendant as his authority for executing the judgment and imprisoning the plaintiff, is not in form or substance in any respect a copy of such certificate. It purports to recite a conviction before another tribunal, to wit, a court of special sessions of which there is no record or certificate.

VI. It is also urged that there was no record, certificate, commitment or evidence, offered by the defendant before the recorder of Albany, that showed or purported to show that the plaintiff had ever been convicted or adjudged guilty of assault or of any other offense. The certified copy of the record which plaintiff produced in his petition, and the commitment returned by defendant, both fail to show a judgment of conviction. They show that he was brought before the recorder charged of this act, or of the ordinances of the city (of Binghamton), in any case where the right to trial by jury is not guaranteed by the constitution. But in all cases in which such right is guaranteed he shall sit as a court of special sessions." Then section 56 of the Code reads: "Subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York and the city of Albany, have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanor committed within their respective counties," which expressly includes assault in the third degree. This trial not having been before a court of special sessions, no legal punishment could follow.

VII. In conclusion, it is claimed that it was the duty of the recorder to examine into all questions as to the legality of the imprisonment, and if he was satisfied that any require-

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ment was wanting, or that any defect appeared to show an illegal imprisonment, it then became his duty to discharge, whether the question was raised by the petition or not. For the reasons above stated it is respectfully submitted that the order appealed from should be affirmed.

LEARNED, *P. J.*—Upon the return having been made to a writ of *habeas corpus*, the court is to examine into the facts alleged in the return (*Sec. 2031*). If there is no traverse of those facts, they must be taken as true (*Matter of Decosta*, 1 *Park. C. R.*, 129; *People ex rel. agt. Neilson*, 16 *Hun*, 214). Therefore, in the present case we are to look at the return made to the writ, and not at the affidavits upon which the writ was obtained. Everything not admitted is expressly denied in the return. The return states that the superintendent holds the relator by virtue of a warrant, a copy of which is annexed, and by virtue of a judgment of conviction for the crime of assault in the third degree, by the recorder of Binghamton, etc.

The relator insists that the recorder had not jurisdiction to try the charge before himself summarily, but must sit as a court of special sessions (*chap. 291, Laws of 1867, tit. 5, sec. 7*), and he insists that this trial was not before a court of special sessions. But the warrant expressly recites the holding of a court of special sessions and the trial of the relator at the same.

Next the relator asserts that the recorder filed a certificate or record (*see the section aforesaid and Code of Crim. Pro., sec. 724*), and that such certificate shows that the recorder acted summarily and not as a court of special sessions.

To this we have to say that the return does not set forth the certificate, and there is no admission that the certificate set forth in the petition is correct. Furthermore, on looking at section 7, above cited, the form is given which the certificate shall substantially have, when the recorder is sitting

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as a court of special sessions or otherwise. That form is followed in the copy set forth in the petition.

Next it is said that section 725, Code of Criminal Procedure, directs that the judgment be executed upon the sheriff, &c., receiving a copy of the certificate, and that the warrant under which the relator is held is not a copy of the certificate.

Now it is pointed out in *People ex rel. agt. Barber* (89 *N. Y.*, 460) that a prisoner who has been properly and legally sentenced to prison cannot be released simply because there is an imperfection in what is commonly called the mittimus; that if the prisoner is safely in the proper custody there is no office for a mittimus to perform. The return states that the prisoner was held by a judgment of conviction, &c. Now we are either to take that as true, in which case the prisoner is properly detained, or we must suppose that the certificate, of which a copy is attached to the petition, is assumed to be the certificate filed by the recorder. In that case we have seen that the form is substantially according to that set forth in section 7, above recited.

One further objection is made. The certificate states that the prisoner pleaded guilty, and proceeds, "whereupon said recorder, upon such conviction, did sentence," &c., and the objection is taken that neither the certificate nor the warrant, after stating a plea of guilty, do in so many words say that the prisoner was convicted. The papers only mention the conviction by way of recital. We think that this objection is hypercritical. After a plea of guilty, there is nothing further for a court to do than to pronounce sentence. The plea of guilty is like the verdict of guilty (*Code of Crim. Pro.*, 471).

There is no duty in the court to "convict," but only to sentence. If the prisoner pleaded not guilty, and if he were tried without a jury, then the court would find him guilty or not guilty; but when he pleads guilty, there is nothing for the court to find. To this effect is section 717, Code Criminal Procedure, "when a defendant pleads guilty or is convicted either by the court or by a jury." This shows that when he

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pleads guilty it is not necessary that there should be any conviction. The subsequent section (722) gives a form which need only be followed substantially.

We think the order appealed from should be reversed, and the prisoner remanded to the penitentiary.

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## SUPREME COURT.

In the Matter of the Petition of MARTIN T. McMAHON, as receiver of taxes, to enforce the payment of a tax for personal property, imposed upon JOHN W. JONES and BENJAMIN P. FAIRCHILD, as administrators, &c., of WILLIAM TYSON, deceased.

*Taxes and assessments — Personal tax — Individual and personal liability of executors and administrators for such taxes.*

The individual property of an executor or administrator may be taken for a tax imposed upon him in his representative character when no property of the testator can be found. And when no goods or chattels are found in the possession of the person so taxed upon which said tax might be levied by distress and sold according to law, the payment of the tax may be enforced pursuant to section 857 of the New York consolidation act (*Laws of 1882*).

That the estate had been settled by a decree of the surrogate before these proceedings were instituted is no answer to the proceedings. The tax was imposed before such settlement took place, and it was the duty of the administrators before making a distribution under the decree to ascertain what the liabilities of the estate were, whether for taxes or otherwise.

Where there is no error in making the assessment upon the administrators, it is no answer that they did not know of the imposition of the tax.

It is too late to question the quantum of a tax after proceedings have been commenced under section 857 of consolidation act.

Where the administrators had an estate in their possession which was subject to taxation here, their failure to ascertain whether it had been so taxed previous to the distribution of such estate does not present a case for either legal or equitable interference.

*New York Chambers, April, 1884.*

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THE assessment was imposed under 2 Revised Statutes, chapter 12, title 2, article 1, section 5, and article 2, section 10 (*See 2 R. S. [Bank's ed.], pp. 989-991*). The proceedings were brought under section 857 of the New York city consolidation act (*Laws, 1882*).

*John J. Townsend, Jr.*, for receiver.

*Orlando L. Stewart*, for respondents.

LAWRENCE, J. — This proceeding is brought to enforce the payment of a tax imposed upon the respondents as administrators of William Tyson, deceased, in the year 1881. The petition of the receiver of taxes is in the usual form, setting forth an assessment in the sum of \$100,000, the advertisement of the fact that the books of the commissioners of taxes and assessment were open for examination and correction; the certification of the rolls by the commissioners to the board of aldermen, as required by law; the publication of the notice that such rolls had been finally completed and delivered to the aldermen, and that thereafter the aldermen imposed the tax in question upon the respondents. It is then among other things alleged that the assessment-rolls were delivered to the petitioner as receiver of taxes; that he gave public notice in the newspapers as required by law; that the tax being unpaid, a warrant was delivered to one of the marshals of the city and county of New York, for the collection thereof; that the same has been returned unsatisfied, and that there are no goods or chattels in the possession of the person so taxed, upon which said tax might be levied by distress and sale, according to law; wherefore, petitioner prays that the payment of the tax may be enforced pursuant to statute.

Mr. Fairchild, the administrator, makes two affidavits in reply to the petition. In the first he states that the deceased resided and died in Passaic county, New Jersey; that he had some personal effects here when he died; that deponent had no notice of any tax upon the lists in this city, supposing that

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the deceased, being a resident of New Jersey, was taxed there and could not be taxed in this state; that in the decree of distribution no provision was made for any such tax; that the deceased died May 23, 1880, and that letters were taken out by the deponent July 1, 1880. In the second affidavit he states that the total amount of the inventory filed in the office of the surrogate of the county of New York of the said estate was the sum of \$113,435.32, and that "the debts due and payable therefrom at the time amounted to the sum of \$64,366.51, leaving of the assets embraced in said inventory the sum of \$49,068.81, and upon the same only a tax is due and payable to the city of New York;" that the amount of said tax at the tax rate legally chargeable for the year 1881, set forth herein, would be \$1,310, instead of the sum of \$2,620, which was duly charged, and wherefore he prays for a reduction of the tax. There is no force in the argument of the respondents' counsel that the estate had been settled by a decree of the surrogate's court before these proceedings were instituted. The tax, it appears, was imposed before such settlement took place, and it was the duty of the respondents, before making a distribution under the decree, to ascertain what the liabilities of the estate were, whether for taxes or otherwise. There is also no force in the statement that the respondents did not know of the imposition of the tax. Every one is presumed to know the law, and it appears by the petition, and it is not denied by the affidavits of the respondents, that all the steps required by law to be taken in and about the assessment and imposition of the tax were duly taken in this instance. There was no error in making the assessment upon the administrators (*See 2 R. S.*, 989, *secs. 1 and 5* [*Banks' 7th ed.*]; *Id.*, 989, *sec. 8, subd. 10*).

It is also too late now to question the quantum of the tax. (*See Smyth agt. International Life Ins. Co.*, 35 *How. Pr. Rep.*, 126). I do not concur in the view of the learned counsel for the respondents, that I am authorized, under section 861 of the consolidation act (*see Laws of 1882, p. 235*), either to

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dismiss the proceedings conditionally or to reduce the tax. There are no facts presented which would justify me in doing so. The tax, as before stated, was legally imposed. Every notice which the law required to be given of its imposition was given, and all that appears is that the respondents neglected to inform themselves of what the law required. They had an estate in their possession which was subject to taxation here; their failure to ascertain whether it had been so taxed does not present to my mind a case for either legal or equitable interference (*See McMahon agt. Sullivan, Daily Register, April 15, 1884; McMahon agt. Brown, Daily Register, March 18, 1884*). For these reasons I am of the opinion that the prayer of the receiver should be granted and the payment of the tax enforced.

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## CITY COURT OF NEW YORK.

VIRGINIA B. MATHEWS agt. MORRIS MATSON.

*Sheriff's fees — Code of Civil Procedure, section 8307, subdivision 7 — What is a settlement within the meaning of this section entitling sheriff to poundage.*

Where a sheriff levies upon property on execution and the execution is afterwards stayed, appeal taken and judgment affirmed, and defendant pays the amount thereof directly to the plaintiff's attorney:

*Held*, that such payment was a settlement within the meaning of section 8307, subdivision 7, of the Code of Civil Procedure, and that the sheriff was entitled to poundage and an allowance.

*Special Term, June, 1884.*

In this case execution was duly issued to the sheriff of New York county against the property of the defendant, upon which a levy was accordingly made. Application for a stay to allow defendant time to make and perfect an appeal was made and granted. The appeal was subsequently argued, and

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judgment affirmed. The defendant then proposed to pay to plaintiff's attorney the face of the judgment and interest, but declined to pay sheriff's fees, whose bill he demanded should be taxed.

On the argument it was contended on the part of the defendant that the sheriff had not collected anything, and, therefore, was not entitled to any fees. For the sheriff it was urged that he had done all that the process required, and the payment to the plaintiff's attorney was virtually a settlement under section 3307 of the Code.

*Edward J. Cramer*, for sheriff.

*William F. McRae*, opposed.

NEHRBAS, J. — The deputy swears that a levy was, in fact, made and a person kept in charge to preserve the property. The payment of the judgment was a settlement within the meaning of section 3307, subdivision 7 of the Code, entitling the sheriff to poundage and an allowance. The sheriff's expenses for a keeper was thirty dollars, which amount will be allowed him as a compensation. The bill is taxed at seventeen dollars and fourteen cents.

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N. Y. SURROGATE'S COURT.

In the Estate of SARAH A. WRIGHT, deceased.

*Code of Civil Procedure, section 2620 — Will — Subscribing witnesses — Proof of handwriting sufficient to establish the execution of a will.*

Where a will contained a full attestation clause, the mere non-recollection of a witness, in respect to the circumstances of its execution, will not justify a finding that the statutory requirements have been disregarded.

*May, 1884.*

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Estate of Wright.

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ROLLINS, S — An instrument purporting to be this decedent's last will and testament has been propounded for probate. It is dated May 20, 1864, and purports to be signed by Thomas J. Hall and Charles B. Coffin as subscribing witnesses. Mr. Hall, formerly one of the firm of William Hall & Sons, music publishers in this city, is now dead. His signature has been satisfactorily proved, and so also has that of the decedent herself. Mr. Coffin, the other subscribing witness, is now engaged in the produce business at No. 65 Pearl street. While he fully identifies his own signature, he has no recollection whatever of the circumstances under which it was written ; but he is positive that he would never have put it upon this disputed paper unless he had known that every allegation in its attestation clause was true. That attestation clause is in the words following :

“ The above instrument was subscribed by the said Sarah A. Wright, in our presence, and acknowledged by her to each of us, and she at the same time declared the above instrument so subscribed to be her last will and testament, and we, at her request, have signed our names as witnesses thereto.

“ NEW YORK, *May* 20, 1864.

“ C. B. COFFIN.

“ THOMAS J. HALL.”

Section 2620 of the Code of Civil Procedure provides that “ if all the subscribing witnesses to a written will are dead, \* \* \* or if a subscribing witness has forgotten the occurrence, \* \* \* the will may, nevertheless, be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action.” This provision does not materially differ from that contained in chapter 460 of the Laws of 1837. The latter has often been under consideration by the courts of this state. In *Butler* agt. *Benson* (1 *Barb.*, 526 [1847] ), it was decided at the Washington special term of the supreme court, that

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“when the witnesses are dead, or from lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence then existing, if there are no circumstances of suspicion, presumes the instrument properly executed, particularly where the attestation clause is full.”

In *Nelson* agt. *McGiffert* (31 *Barb. Ch.*, 158 [1848]) the same doctrine was maintained by the chancellor.

It was again asserted by the surrogate of this county in *Peebles* agt. *Case* (2 *Bradf.*, 226, 1852), and by the Madison general term of the supreme court in *Cheeney* agt. *Arnold* (18 *Barb.*, 434 [1854]).

The facts in the case of *Orser* agt. *Orser* (24 *N. Y.*, 51 [1861]) were almost precisely like those with which we have here to deal. The attestation clause was full. There were two subscribing witnesses, one of whom had died before trial. His signature was proved, and, as in the case at bar, the body of the instrument was shown to be in his handwriting. The other witness was examined, but could not remember that the decedent declared the instrument there in question to be his will, or that he acknowledged his signature thereto. SELDEN, J., pronouncing the opinion of the court, said: “A will duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear from recollection that the formalities required by the statute were complied with, and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were.”

The court held that, upon the facts there appearing, the jury were warranted in finding the due execution of the will.

*Moore* agt. *Griswold* (1 *Redf.*, 388 [1863]) sustained the proposition that, in the absence of suspicious circumstances or contradictory evidence, proof of the signatures of the testator and of the deceased, subscribing witnesses, were sufficient to establish the execution of a will.

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In *Rider* agt. *Legg* (51 *Barb.*, 260 [1868]) at the Rensselaer special term, a will was established upon proof of the signatures of the testator and of two subscribing witnesses, both of whom were dead. There was a full attestation clause and an absence of circumstances calculated to arouse suspicion. The court cited, with approval, some of the cases above named, as well as *Brinkerhoff* agt. *Remsen* (8 *Paige*, 491 [1840]); *Chaffe* agt. *Baptist Miss. Con.* (10 *Paige*, 85 [1843]); *Everitt* agt. *Everitt* (41 *Barb.*, 385 [1864]); and *Lawrence* agt. *Norton* (45 *Barb.*, 448 [1866]).

In *the Matter of Kellum* (52 *N. Y.*, 517 [1873]), chief justice CHURCH, pronouncing the opinion of the court, declared that whenever the attestation clause is full, and the signatures are satisfactorily proved and the circumstances are corroborative of due execution, and there is no evidence disproving a compliance (with the requirements of the statute), it may be justly presumed that all those requirements have been observed, "although the witnesses are unable to recollect the execution or what took place at the time."

In *Brown* agt. *Clark* (77 *N. Y.*, 369 [1879]), in *Rugg* agt. *Rugg* (83 *N. Y.*, 592 [1881]), and *In Matter of Pepoon* (91 *N. Y.*, 255 [1883]), the court of appeals reasserted the proposition that where a will contained a full attestation clause, the mere non-recollection of a witness in respect to the circumstances of its execution would not justify a finding that the statutory requirements had been disregarded.

Upon the authorities which I have cited, and in the absence of any circumstances throwing doubt or suspicion upon the genuineness of the instrument here propounded, I hold that that instrument is entitled to probate. A decree may be entered accordingly.

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COURT OF APPEALS.

In the Matter of the Petition of the UNITED STATES for the appointment of commissioners, &c.

*The Harlem widening — Constitutional law — Constitutionality of chapter 147 of the Laws of 1876 in relation to the improvement of the Harlem river and Spuyten Duyvil creek, and the various acts amendatory thereof, upheld.*

On an appeal from an order made by the supreme court denying a motion to vacate certain orders by which the commissioners of estimate and assessment were appointed to carry into effect an act entitled "An act granting to the United States the right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river, through the Harlem kills, and ceding jurisdiction over the same" (*Laws of 1876, chap. 147, as amended by chap. 845 of the Laws of 1879*). The orders were made in the course of proceedings instituted by the United States through petition dated October 8, 1879, addressed to the supreme court of this state, setting forth a desire to acquire certain described lands as necessary for the construction and use of the improvement, and other allegations required by the provisions of the statute relating thereto:

*Held, first*, that while the federal government, as an independent sovereignty, has the power of condemning lands within the states for its own public use, it may lay aside its sovereignty and as a petitioner enter the state courts and there accomplish the same end through proceedings authorized by the state legislature. The state may delegate its power to the United States where the use is public and the convenience is shared by its own citizens. Lands may be taken for the use of the people of the United States, and it cannot prejudice the proceedings for that purpose that they are instituted by consent of the legislature of the state in which they lie, and in a way prescribed by it, made to conform to the regulations of its courts.

*Second.* The use for which the land is sought is a public one.

*Third.* The fundamental doctrine is that private property cannot be taken for public purposes without just compensation. But this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. This means reasonable legal certainty. The acts under which these proceedings are justified make such provisions.

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*Fourth.* The subject is well expressed in the title of the act of 1876: "The right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and ceding jurisdiction over the same." The act itself is limited to matters which relate to that subject, or which are implied in it and are necessary to make it effectual, the acquisition of lands by purchase or compulsory proceedings, the manner of payment and the mode of acquiring means therefor. All these are incidental to or parts of the principal matter and are material to the accomplishment of the general purpose (*Affirming S. C.*, 66 *How.*, 517).

*Decided May, 1884.*

*Franklin Bartlett*, for appellants.

*Samuel E. Lyon*, for respondent.

DANFORTH, J. — This is an appeal from an order made by the supreme court (LAWRENCE, J.) denying a motion to vacate certain orders by which commissioners of estimate and assessment were appointed to carry into effect an act entitled "An act granting to the United States the right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river through the Harlem kills, and ceding jurisdiction over the same" (*Laws of 1876, chap. 147, as amended by chap. 345 of the Laws of 1879.*)

The orders were made in the course of proceedings instituted by the United States, through petition dated October 8, 1879, addressed to the supreme court of this state, setting forth a desire to acquire certain described lands as necessary for the construction and use of the improvement, and other allegations required by the provisions of the statute relating thereto (*Laws of 1876, chap. 147, sec. 2.*)

The appellants have a standing in court as persons whose lands are affected by those proceedings, and in their behalf the point is made that the acts in question are unconstitutional and void, because,

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1. "The right of eminent domain cannot be exercised by one sovereignty for the uses of another," and, therefore, "the state cannot condemn lands for the use of the general government."

2. Because they are designed to take private property without making just compensation.

3. Because the title of the act offends article 3, section 16 of the Constitution, which provides that no local or private bill shall contain more than one subject, and requires that subject to be embraced in the title.

*First.* While the federal government, as an independent sovereignty, has the power of condemning lands within the states for its own public use (*Cooley's Const. Law* [5th ed.], 525; *Kohl* agt. *U. S.*, 91 *U. S. R.*, 367), we see no reason to doubt that it may lay aside its sovereignty, and as a petitioner enter the state courts, and there accomplish the same end through proceedings authorized by the state legislature. If the state may delegate its power to a private corporation of another state for the benefit of a canal located within its borders, as was held by this court *In the Matter of Peter Townsend* (39 *N. Y.*, 171), so it may to an independent political corporation where the use is public and the convenience shared by its own citizens (*Gelmer* agt. *Lime Point*, 18 *Cal.*, 229; *Burt* agt. *Merchants' Insurance Co.*, 106 *Mass.*, 356.)

That the use for which the land is sought is a public one, has not only been determined by the legislature (*Laws of 1876, supra*; *sec. 6 of 1880, chap. 65*; *sec. 5, as amended by sec. 1, chap. 214 of the Laws of 1883*), but is also apparent. The river and the creek are within the state, in each the tide ebbs and flows; the improvement is beneficial, therefore, not only for the purposes of the general government in its control over navigable tide waters, but will also provide for our own citizens through an unobstructed waterway, means of easy transportation and communication between the North and East rivers. Therefore, whether we regard the principle

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which controls the exercise of eminent domain or the constitutions of the federal and state governments, there would seem to be no reason why the state should not accept the aid offered by the United States in carrying on a public work in which both are interested. The state, by its governor, might take possession of the necessary lands under the authority of the legislature, and by purchase, or through proceedings in the courts, deprive the owner of his title (*Code, sec. 2104*). So might the United States (*Code, sec. 2119*). It would be very singular that that which either might do, could not, with equal propriety, be accomplished by both. But in face of all this the learned counsel for the appellant argues that the statutes before us (*Laws of 1876 and 1879, supra*) are not within the sphere of state powers, and in support of that contention cites *Trombly agt. Humphrey* (23 Mich., 481). In that case, however, the United States was not a promoter, and the damages when assessed were to be paid from the state treasury. It was held the state could not condemn lands for the use of the United States, or assess the compensation it should pay; that such appropriation and assessment must, therefore, be provisional and subject to its acceptance and ratification, and so the court refused to grant to the landowners a *mandamus* to compel the state treasurer to pay the sum awarded. This feature seems to distinguish it from the case before us, for here the United States is an actor; is itself moving to condemn the property in question, and has actually appropriated money towards the desired improvement (*U. S. Statutes, vol. 50, pp. 158, 372; U. S. Statute of 1874, chap. 457; of 1875, chap. 134; of 1878, chap. 264; of 1879, chap. 101*). In that the state undertook to act not for its own ends, but in order to turn the land when taken, over to the United States for light-house purposes, provided the federal government would receive it, "so that," as the learned commentator, who, as judge, took part in the decision says, "the aid of the court was invoked, not to enable the United States to obtain lands it wanted, but to compel the state to pay for lands for

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the United States which were not wanted" (*Cooley's Const. Law* [3d ed.], note to page 526). The effect of the decision was that the state could not condemn land for the use of the United States, so as to bind the federal government to make compensation.

In the case before us the legislature provides a method of compensation to the landowners independent of any action by the federal government in respect thereto.

*Kohl* agt. *The United States* (*supra*) is also cited by the appellants. That case decides that the United States may exercise within the states the power of a sovereign, and condemn land for its own use, by proceedings in its own courts, and is not compelled to resort to state courts.

Neither proposition is in issue here. That case does not hold that the federal government cannot, if it chooses, go into the state courts to secure the same end. *Darlington* agt. *United States* (82 Penn., 382), is also insisted upon by the appellants. The decision turned upon the construction of two statutes, one of the United States the other of the state. The validity of both was assumed. By the first, congress (17 U. S. Statutes at Large, 621) authorized the secretary of the treasury to acquire by purchase, or if necessary by condemnation, "a suitable piece of ground in the city of Pittsburg, for the erection of a court-house" and other government offices. By the other statute the state consented to such acquisition, and provided that if condemnation were resorted to the laws of the state applicable to such proceedings should govern, but provided that the United States might pay the costs and refuse to take the land, if in its judgment the compensation assessed therefor was excessive. Under this act a petition was presented to the state court by the United States through its attorney, in which these statutes were set forth, and also that three pieces of land had already been condemned and a fourth was wanted "with a view of selecting one of them." The court held upon appeal by its owner that proceedings for condemning the

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fourth site were not authorized by the act, and that in other respects the petition was insufficient. For this reason, and not for want of jurisdiction in the state court or capacity in the suitor, all proceedings subsequent to the filing of the petition were set aside.

These cases, *Trombly* agt. *Humphrey*, *Kohl* agt. *United States* and *Darling* agt. *United States* (*supra*), do not aid the appellants, while *Gilmer* agt. *Lime Point* and *Burt* agt. *Merchants' Insurance Company* (*supra*) are opposed to their contention. In both proceedings for the condemnation of lands on the application of the United States were entertained by the state courts. Under the first premises were condemned for a fortification; under the second for a post-office. They accord with the views expressed by this court in the *Townsend* case (*supra*); are not opposed to those of *Kohl* agt. *United States* (*supra*), and contain, we think, a correct exposition of the law. If lands may be taken for the use of the people of the United States, it cannot prejudice the proceedings for that purpose that they are instituted by consent of the legislature of the state in which they lie, and in a way prescribed by it, made to conform to the regulations of its courts. Nor was the action of the legislature in this case without a precedent. By the Laws of 1847 (*chap.* 196) the state consented to the purchase by the United States of lands for the purpose of erecting a light-house, and provided that if the title could not be so acquired the land might be taken and damages assessed by inquisition from the state court, in like manner as if it had been taken for the use of the people of the state, that contingency arose. Upon an application by the United States to our state court for a writ *ad quod damnum* to assess the owner's damages, it was objected in his behalf, among other things, "that it was not competent for the state to assign to the United State its eminent domain for any purpose foreign to the use of the state;" but the contention did not prevail and the writ issued (*United States* agt. *Dumplin Island*, 1 *Barb.*, 24).

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General provision for such cases was also made by the statute (2 *R. S.*, 111, *chap.* 14, *art.* 4), which provided for the assessment of the owner's damages whenever lands were taken for the use of the United States by consent of the legislature of this state. A similar clause is also contained in our present statute (*Code*, *sec.* 2119). The one before us is equally within the power of the legislature to enact, and is designed for cases and to remove difficulties which the other did not provide for. The same principle, however, governs both.

*Second.* The fundamental doctrine, of course, is that private property cannot be taken for public purposes without just compensation. But this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages (*Bloodgood* agt. *M. and H. Railroad Co.*, 18 *Wend.*, 9; *Lyon* agt. *Jerome*, 26 *Wend.*, 485; *People* agt. *Hayden*, 6 *Hill*, 359; *Rexford* agt. *Knight*, 11 *N. Y.*, 308). This means reasonable legal certainty (*Clapham* agt. *Gates*, 54 *N. Y.*, 146; *Sage* agt. *City of Brooklyn*, 89 *N. Y.*, 189). Have the acts under which these proceedings are justified omitted to make such provision? The answer to this question depends upon the law as it existed when the motion was denied; that was on the 1st day of February, 1884. No land had then been taken, and the proceedings to that end were inchoate.

By the act of 1876 (*chap.* 147, *sec.* 4) it is made the duty of the commissioners to ascertain and determine the compensation which ought justly to be made to those owning or interested in the real estate appraised; and section 5 provides for a hearing of their report by the court upon notice to the parties interested, and an order, if it be confirmed, directing to whom the money is to be paid, but I do not find in it any provision indicating how the money is to be raised. By the amendment of 1879 (*chap.* 345, *sec.* 5), however, the commissioners are directed not only to ascertain the compensation to

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be made, but also "the amount to be assessed upon the real estate benefited by the improvements and establish the area of real estate upon which the amount necessary to pay the awards and expenses of such proceedings shall be assessed by them." Section 6 of the same act so amends section 5 of the act of 1876 as to provide for the collection of the assessment and payment of the awards to those entitled thereto, and a report to the court for such action as to it shall seem meet. It is only after these things are done that the United States can take possession of the property or the owners be divested of their rights.

In 1880 the act of 1876 was further amended (*Laws of 1880, chap. 167*); and in 1881 the last act was also amended (*chap. 61 of the Laws of 1881*) and the comptroller of the city of New York authorized to raise on the assessment bonds of the city the sum of \$50,000, or so much as might be necessary to make up any deficiency in collection of the sums assessed under the statute relating to this improvement, and from the proceeds of the collections and these bonds pay all sums which had been awarded to persons interested in lands taken for it.

Further amendments were made in 1883 (*Laws of 1883, chap. 214*) and the comptroller of the city of New York was authorized to raise upon the assessment bonds of the city of New York a sum not exceeding \$200,000, and to pay therefrom the several sums awarded to the owners or parties interested in the lands taken, or to be taken, for the purposes of said improvement, and declared that this being done the United States should be entitled to enter upon, take possession and use the lands and premises for the purposes of the improvement, and all persons who had been made parties to the proceeding should then be divested and debarred of all right and interest in the same. This is quite sufficient. The statute not only provides for raising the necessary money, but for payment of it to those interested before they can be

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requested to part with their property. Its payment is made a condition precedent.

If any doubt existed as to the force and effect of prior statutes relating to this matter (*Laws of 1876, chap. 147*; 1879, *chap. 345*; 1880, *chap. 65*; 1881, *chap. 61*; 1882, *chaps. 377, 410*) it is removed by the one cited (*Laws of 1883, supra*), and by which they are amended. Up to the time of the passage of that act no person was aggrieved, no land had been taken, and so far as appears no one complained of any wrong. However defective the original act might be in respect to the method of compensation the defect might be waived by persons interested (*In re Application of Cooper to Acquire Lands*, 93 *N. Y.*, 507), or rights of landowners relinquished by their consent. Until their property was interfered with there could be no ground of complaint, and if at that time compensation was provided for the ground would be taken away. So far as the question now before us is concerned it in no degree affected the legality of the proceedings under the statutes for the appointment of commissioners or their proceedings. By none of them could any constitutional right be impaired.

*Third.* I have already set out the title of the act of 1876. It is not fairly open to the objection urged against it. The subject is well expressed: "The right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and conceding jurisdiction over the same." The act itself is limited to matters which relate to that subject, or which are implied in it and are necessary to make it effectual, the acquisition of lands by purchase or compulsory proceedings, the manner of payment and the mode of acquiring means therefor. All these are incidental to or parts of the principal matter and are material to the accomplishment of the general purpose. This is sufficient (*Brewster agt. City of Syracuse*, 19 *N. Y.*, 117; *In re Mayer*, 50 *N. Y.*, 504; *Newsdorf agt. Duryea*, 69 *N. Y.*, 557; *In re Department of Public Parks*, 86 *N. Y.*, 437).

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Some other objections to the validity of the statutes are made by the learned counsel for the appellants. They assume that the indebtedness created by the city of New York under the bonds issued will be for other than its own purposes. The whole argument of the judges in *Townsend's case* (*supra*) is to the contrary and applies here. In that case an artificial canal was deemed a proper object for the exercise of the right of eminent domain, because it increased the means of intercommunication and so became of interest to every business man and owner of property in that city, while the improvement now in question will, if carried out, render useful a continuous navigable stream within its own borders, thus adding to its producing power and the value of all land within those limits.

No other portion of the appellant's argument requires notice. It discloses no error in the order appealed from, and it should therefore be affirmed.

All concur.

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### N. Y. COMMON PLEAS.

GEORGE LETEGNE agt. JOSEPH SCHWARZLER and JOSEPH ADAMS and others.

*Mechanics' lien — Complaint — Error in name of the owner in notice of claim can be corrected in complaint — What are necessary averments in complaint — When complaint may be amended.*

An error in the name of the owner in the notice of claim in a mechanic's lien proceeding can be corrected in the complaint by setting forth the mistake and averring the true owner.

The complaint must allege that there is something due by the owner to the contractor under the contract, when the action was brought to enforce the lien, but an amendment may be made in this respect.

*Equity Term, April, 1884.*

*George F. Langbein, for plaintiff.*

*Julius Lippman, for defendants.*

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DALY, C. J.— The question in this case is whether an error in the name of the owner in the notice of claim can be corrected in the complaint by setting forth the mistake and averring the true owner. Formerly this could not be done, but now I think it can be.

We held, in *Beals* agt. *Congregational B'nai Jeshurun* (1 *E. D. Smith*, 654), that all the particulars which the claimant was required to specify in the notice creating the lien were material; that these particulars, in the language of my former colleague the late judge WOODRUFF, "were wisely provided for to enable the county clerk to make the proper docket to give early notice to owners that their property was sought to be charged, and to protect third persons (purchasers or mortgagees) by apprising them of the alleged claim, and that among these requisites of the notice no one was more important for these purposes than that the name of the owner should be stated." And in *Conklin* agt. *Wood* (3 *E. D. Smith*, 662) we held that the omission of any of the particulars required by the statute in the notice of the claim was fatal and could not be amended. In accordance with these early cases it was, therefore, repeatedly held afterwards in this court and in other states (*Hoffman* agt. *Walton*, 36 *Mo.*, 613; *Hicks* agt. *Murry* 43 *Cal.*, 515; *Philips on Mechanics' Liens*, p. 484, sec. 347) that the facts required in the notice must be averred in the complaint to show a cause of action, the action being founded upon the lien, and that if the notice was defective by the omission of the name of the owner, or of anything which the statute required, it was not amendable and that the action could not be maintained.

When these decisions, however, were rendered the lien laws then in force required the county clerk to docket all the particulars contained in the notice of the claim in a book to be kept in his office called the lien docket. The acts required this docket to be suitably ruled in columns, headed "claimants," "against whom claimed," "owners," "building," "amount claimed," "date of notices," "hour and minute" and "what

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proceedings have been had," and that the names of owners and persons against whom the claim was made should be inserted in alphabetical order. As early as 1851 among the particulars required to be stated in the notice was "the name of the owner of the building" (*Laws* 1851, *chap.* 513, *sec.* 4). And this was required in all subsequent acts down to the enactment of the lien law of 1863, by which act this was dispensed with and other material changes were made. All that was required by this act of 1863, in the notices, was the name and residence of the claimant, the amount claimed, from whom and to whom due, and with a brief description of the premises by street number, diagram or boundary, or by reference to maps open to the public, "so as to furnish information to persons examining titles and the supposed owner." This act also declared (*sec.* 6) that no error in the owner's name should impair the validity of the lien, and no entry was required by it of the owner's name in the docket as in the previous acts. It simply provided that the docket should contain: 1st, the name and residence of the claimant; 2d, the person against whom the claim was made; 3d, the amount; 4th, the date of filing; 5th, and the street and particular place where the premises were located, in such manner as to be convenient in searching for the liens by street or block. The lien law was amended further in 1875 by an act still in force (*Laws* 1875, *chap.* 379), which act (*sec.* 8) required a statement in the notice of the name of the owner, or reputed owner, if known (*sec.* 7), but did not require any entry of the owner's, or reputed owner's, name in the lien docket, the provisions in this respect being substantially the same as under the preceding act of 1863.

Since 1863, therefore, the name of the owner had not been required in the lien docket, the entry of it being no longer deemed necessary to give notice to the owner or to protect third persons purchasing or mortgagees, and, in accordance with that and the subsequent act of 1875, the principal docket now, or first column, is a representation of the street and block

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where the property is situated, and the street number, that being considered with the other particulars sufficient to give notice to all persons who can possibly be affected by the creation of the lien. The omission, therefore, now, of the owner's name in the docket, as also the provision of the act of 1863, that no error in the owner's name should impair the validity of the lien, shows very clearly that the intention was to relieve mechanics and material men from the obligation they were previously under, which it was sometimes difficult to comply with, of obtaining the name of the owner and inserting it in the notice, that it might be incorporated in and form part of the docket of the lien, before they could file the notice which created the lien. As the law now is, the mechanic or material man may insert the name of the owner, or, if he does not know who the owner or reputed owner is, he may state that fact, which dispenses with the name of any owner in the notice; and as no entry of the owner's name in the docket is now required, I see no reason why the lienor should not be allowed to correct any mistake or error in the name of the owner in the notice by proper averments in the complaint, as no injury can arise to any one thereby (*Hubbell agt. Schreyer*, 15 Abb. [N. S.], 304, per ALLEN, J.; *Young agt. Doying*, N. Y. Com. Pl., S. T., April, 1884; *Keenland on Mechanics' Liens*, 208, sec. 191; *Phillips on Mechanics' Liens*, 10).

In the case first cited of *Hubbell agt. Schreyer*, which was a review by the court of appeals of a judgment of this court, it was declared by ALLEN, J., who delivered the opinion of the court, that the lien law was a remedial statute, as furnishing a summary remedy for the recovery of the claims provided for; and while it was to be strictly construed, so far as to require a substantial compliance with every material provision by which the property of a third person may be incumbered, and a cloud put upon the title, by the mere act of the claimant, it is not to be so strictly and hypercritically interpreted as to deprive creditors of the benefit intended to be conferred.

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That it was to be construed in the same spirit with which it was enacted, and so as to carry out the benign intent of the legislature, by which nothing was to be taken by implication against the owner, or to the prejudice of his substantial rights, or so as to extend to persons or claims not clearly within its terms, and that the framers of the statute have, in a measure, indicated the spirit with which they would have the statute interpreted, and effect given to it.

In this case, although the contract for the work was made by the claimant jointly with two others, and he united in the notice that the claim was due to him as the sole creditor, it was held that this did not affect the validity of the lien, as neither the owner nor any one else could be misled thereby as to the particular claim intended to be inserted, and as to which a lien was sought to be created. If this was held in respect to the name of the claimant, which then and as the law now stands must be inserted in the notice of the claim and entered in the docket, what was said in respect to the liberal construction of the statute in connection with and as explanatory of this decision, is especially applicable in support of the conclusion I have arrived at — that an error in the owner's name in the notice may be cured by proper averments in the complaint, where no injury to the owner can arise thereby.

In this case it appears by the complaint that Joseph Schwarzler represented and stated that he was the owner of the building to Joseph C. Adams, who did the carpenter work, and with whom the plaintiffs contracted for the work done by them; that Adams repeated to the plaintiffs the statement that Joseph Schwarzler made to him, that he was the owner; and they, believing this to be true, inserted his name in the notice and swore to the fact as of their own knowledge; that after they had filed their notice they discovered that the representation of Schwarzler was untrue, and that his brother, August Schwarzler, was the owner. Joseph Schwarzler being the builder or contractor with his brother, and that therefore they had made him (August Schwarzler) a party defendant in

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the action brought for the enforcement of the lien. I think they may now do this, as I have already said the statement of the ownership being no longer material to the extent that it was in the prior acts, when the name of the owner was not only inserted in the notice of the lien, but had to be incorporated with and formed a part of the lien docket, which is no longer necessary.

In respect to the case of *McElwee agt. Sanford* (53 How., 89), which the defendant relies upon, it will be sufficient to say that the changes which I have pointed out as having been made in the lien law are not referred to in the opinion, and I suppose were not considered.

The remaining objection, however, is well taken. There is no allegation in the complaint that there was anything due by the owner to the contractor, Joseph Schwarzler, under the contract when the action was brought to enforce the lien.

It has been held that this is a necessary averment in the complaint (*Bailey agt. Johnson*, 1 Daly, 67, and cases there cited). In this respect, however, the complaint can be amended.

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## SUPREME COURT.

WESTON MILLER agt. MARY A. MILLER, executrix, *et al.*

*Costs and disbursements against executors and administrators on reference of claim — Code of Procedure, section 317 — Code of Civil Procedure, sections 1835, 1836, 3246.*

Where a claim against a decedent's estate is materially reduced upon a reference under the statute, thus making it plain that payment thereof has not been unreasonably resisted or neglected, neither costs nor disbursements can be recovered by the claimant under Code of Civil Procedure (*secs. 1835, 1836*).

The law granting disbursements as a matter of right in cases of this kind is in the Code of Procedure (*sec. 317*), and section 3246 of the Code of Civil Procedure takes the place of this section of the old Code and does not give disbursements as a matter of right. Disbursements then, like

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costs, are to be awarded by the court as provided in sections 1835 and 1836, Code of Civil Procedure (*R. S.*, part 2, title 8, chap. 6, sec. 87). They do not belong to the prevailing party in such cases as a matter of right.

*Fourth Department, General Term, May, 1884.*

*Before* JAMES C. SMITH, P. J.; HARDIN and BARKER, JJ.

THIS is an appeal from an order of the special term of the supreme court, made by justice FOLLETT, denying "disbursements" incurred upon a reference and trial, under the statute (2 *R. S.*, 88, sec. 36; 7th ed., p. 2299, sec. 36) of a claim rejected by defendants as executors. The claim presented was for \$1,900.90 and interest. Plaintiff recovered \$321.35. The claim was for work and services rendered by plaintiff for defendants' testator, from 1863 to 1876, and it was held by the referee that a large portion was barred by the statute of limitation.

*George Ade*, for appellant :

I. Section 317, Code Procedure: "Whenever any claim against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referee and witnesses, and other necessary disbursements to be taxed according to law." In *Linn* agt. *Claw* (14 *How.* 508, at p. 510), HARRIS, J., says: "The provision in the 317th section of the Code, which entitles the successful party to recover his disbursements, cannot, I think, be regarded as affecting the power of the court in proper cases, to award costs as in an action to the prevailing party. "This provision was only intended to secure the party his disbursements, in all cases, without regard to the exercise of the discretion vested in the court, to grant or withhold costs." In this case, therefore, the plaintiff is entitled to recover, as matter of legal right, his disbursements." In *Ridley* agt. *Fisher* (24 *How.*, 404, 405), MARVIN, P. J., says: "This provision (*of* sec. 317, *Code*) is imperative in favor of

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the prevailing party," and at page 408: "The effect of this provision is that now the claimant, plaintiff, will, where the report is in his favor, recover these items of costs without any regard to the fact whether the claim was unreasonably resisted or neglected (*Newton agt. Sweet, Ex.*, 4 *How.*, 134; *Van Sickler agt. Graham*, 7 *How.*, 208; *Avery agt. Adams*, 9 *How.*, 349). It will be observed that a distinction is made in section 317, between "actions" and references under the statute." Actions fall within 2 Revised Statutes, 89, section 41 (*Code of Civil Pro.*, secs. 1835, 1836, takes its place; *Morgans agt. Skidman*, 3 *Abb. N. C.*, 92; *Horton agt. Brown*, 29 *Hun*, 654). But the recovery of disbursements by the prevailing party upon a reference under the statute was made imperative (*Ridley agt. Fisher*, 24 *How.*, 404, *supra*; *Linn agt. Claw*, 14 *How.*, 508, *supra*).

II. Has any law been passed repealing that clause in section 317, Code Procedure, allowing the fees of referees and witnesses and other necessary disbursements" to the prevailing party? Chapter 417, Laws of 1877, section 4, did not repeal sections 311 to 322 of the Code of Procedure. Chapter 245, page 367, Laws of 1880, section 1: "The following acts and parts of acts, heretofore passed by the legislature of the state, are hereby repealed, namely: Fourth, page 369: The act entitled "An act to simplify and abridge the practice," &c., called Code of Procedure. Now, in repealing sections 311 to 322, the Code of Procedure (*sec.* 317) would be repealed if there is no exception or reservation of the same or any part of it. Chapter 245, page 367, Laws of 1880, section 3, page 374: "The repeal effected by the first section of this act is subject to the following qualifications," viz.: Subdivision 8, page 375, of section 3; page 374, chapter 245; page 367, Laws 1880, *supra*: "It does not effect the right of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon a reference of a claim against a decedent as provided in those portions of the Revised Statutes left unrepealed after this act takes effect."

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III. Plaintiff's claim was against a decedent, and referred as provided in those portions of the Revised Statutes left unrepealed after this act took effect (3 *R. S.* [7th ed.], 2299, sec. 36), it having been held imperative under section 317, Code of Procedure, that the prevailing party upon a reference was entitled to the fees of referee and witnesses and his other necessary disbursements. Chapter 245 of 1880 did not change the rights of the prevailing party, and it still remains imperative upon the court to allow such items to plaintiff herein. The plaintiff is the prevailing party. His claim was rejected *in toto*. He could not sue in justices' court (*Code of Civil Procedure*, sec. 2863). He recovered more than fifty dollars. The defendants could have saved themselves from the payment of these disbursements by an offer of judgment under section 738, Code of Civil Procedure. If the plaintiff had not recovered more than was offered, he could not have recovered these disbursements, for he would not have been the prevailing party. The defendants intended to beat the plaintiff out of every dollar or pay these disbursements. They failed in their defense and ought to pay.

IV. It is not permitted to interpret what has no need of interpretation. To conjecture is to elude (*Wattle*, book 2, chap. 17, sec. 263; *Jackson agt. Lunis*, 17 *Johns.*, 475; *S. C.*, 13 *id.*, 504; *W. and W. T. Co. agt. People*, 9 *Barb.*, 161; *People agt. N. Y. C. R. R. Co.*, 13 *N. Y.*, 7; *S. C.*, 25 *Barb.*, 199). By chapter 245, Laws 1880, the legislature repealed sections 311 to 322, except that portion of section 317, which it declared to remain in full force. This reservation or exception is as broad and in the identical language of the original section. In *Peck agt. Peck* (60 *How.*, 206; 8 *Abb. N. C.*, 400) LARREMORE, J., holds "that the exception in chapter 245, Laws of 1880 ([3], p. 367 [4], p. 368 of sec. 49, 2 *R. S.*, 146) rendered inoperative section 1761 of the Code of Civil Procedure." This case is right in point. In *Ely agt. Halton* (15 *N. Y.*, 595, at p. 598) DENIO, C. J., says: "The portion of the amended sections which are merely

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copied without change are not to be considered as repealed and again enacted, but to have been the law all along, and the new parts or the changed portions (*Code of Civil Pro.*, secs. 1835, 1836) are not to be taken to have been the law at any time prior to the passage of the amended act." *Smith's Commentaries on Statute and Constitutional Law* (p. 711, sec. 577): "A saving must be of a thing *in esse*. The nature of a saving is to preserve a former right and not to give or create a new one." *Smith's Commentaries* (*supra*, p. 712, sec. 578): "A proviso is something engrafted upon a preceding enactment. It was held by all the barons of the exchequer that where the proviso of an act was directly repugnant to the purview of it the proviso should stand and be held a repeal of the purview, because it was said it speaks the last intention of the law-giver. The office of a proviso is not to enlarge or extend the act, or the section of which it is a part, but rather to put a limit and a restraint upon the language which the law-maker has employed" (*In the Matter of Geo. B. Webb* (24 *How.*, 247, 249). - Consider that clause in section 317, Code of Procedure, allowing disbursements to the prevailing party an entire section by itself. It is a universal rule that where the exception or proviso in a repealing act is as broad, or in the identical words of the act or law repealed, nothing is repealed, and the act or law so excepted or reserved remains in full force and effect.

V. The case of *Daggett* agt. *Mead* (11 *Abb. N. C.*, 116) was, as I have been informed by judge MURRAY, decided at the circuit and special term. It was stated that section 317, Code of Procedure, was repealed, and sections 1835, 1836, Code of Civil Procedure, took its place. Nothing was said of the exception or proviso in section 3, subdivision 8 of chapter 245 of Laws of 1880. Judge FOLLETT evidently followed this decision, declining to overrule judge MURRAY; and as both judges say, the question is one worthy the careful consideration of a higher court, to the end that a uniform practice

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may be had throughout the entire state, and one rule adopted in the vast number of cases referred under the statute.

*Davie & Arbuckle*, for respondents :

I. If the plaintiff is entitled to recover his disbursements, it must be under some provision of law or order of court. Section 317 of the Code of Procedure provided that "in an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against the person prosecuted or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense. And this section shall not be construed to allow costs against executors or administrators where they are now exempted therefrom by section forty-one, of title three, chapter six of the second part of the Revised Statutes; and whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. And the court may, in its discretion, in the cases mentioned in this section, require plaintiff then to give security for costs." By this section of the old Code it is expressly provided that the "prevailing party" shall recover his disbursements. The Code of Civil Procedure has substituted section 3246 for section 317 of the old Code; section 3246 provides as follows: "In an action brought by and against an executor or administrator in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or be sued, costs must be awarded as in an action by or against a person prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of this act; but they are exclusively chargeable upon and collect-

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ible from the estate fund or person represented, unless the court directs them to be paid by the party personally for mismanagement or bad faith in the prosecution or defense of the action." The balance of section 317 of the old Code is therefore repealed ; and it was only under the repealed portion that the "prevailing party" was entitled to his disbursements. By section 3246 of the Code of Civil Procedure it is provided that in an action brought by or against an executor or administrator in his representative capacity, costs must be awarded as in an action by or against a person prosecuting or defending in his own right except as otherwise prescribed in sections 1835 and 1836 of this act. Section 1835 provides as follows: "Where a judgment for a sum of money only is rendered against an executor or administrator in an action brought against him in his representative capacity, costs shall not be awarded against him except as prescribed in the next section." Section 1836 provides: "Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, or that the defendant refused to refer the claim as prescribed by law, the court may award costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent, as the court directs, having reference to the facts which appeared upon the trial. Where the action is brought in the supreme court or in a superior city court, the facts must be certified by the judge or referee before whom the trial took place." By section 3256 of the Code of Civil Procedure the party to whom costs are awarded is entitled under such an award to his disbursements. It follows, therefore, that unless a party is entitled to recover costs in an action, that he is not entitled to recover disbursements. The last clause of section 317 of the old Code having been repealed, no section of the Code of Civil Procedure

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provides that the "prevailing party" can recover his disbursements unless he is entitled to recover his costs.

II. The costs and disbursements in a case of this kind are in the discretion of the court, and can only be awarded to the party by order of the court. In this case his honor, justice FOLLETT, has denied costs and disbursements to either party, which decision was entirely in his discretion and will not be reviewed by this court. In the case of *Daggett agt. Meade* (11 *Abbott's N. C.*, 116), his honor, justice MURRAY, holds that under sections 1835 and 1836 of the Code of Civil Procedure, the right to recover disbursements depends upon the allowance of costs.

III. Section 3333 of Code of Civil Procedure is almost identical with section 2 of old Code and defines what an action is. Section 3334 of Code of Civil Procedure is almost identical with section 3 of old Code and defines what a special proceeding is. The case of *Roe agt. Boyle* (81 *N. Y.*, 305), decides that "a proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action but a special proceeding" (*See, also, Mowry agt. Peet*, 88 *N. Y.*, 453). Section 3240, Code of Civil Procedure, provides that costs in a special proceeding are in the discretion of the court.

IV. We have not overlooked the repealing act. Chapter 245, Laws 1880, section 3, subdivision 8, provides that "it does not affect the right of a prevailing party to recover the fees of referee and witnesses and his other necessary disbursements upon the reference of a claim against a decedent as provided in those portions of the Revised Statutes left unrepealed after this act takes effect." But this exception has no application to this case as there is not now and never was a section of the Revised Statutes providing that the prevailing party should recover his disbursements as a matter of right. The section of the Revised Statutes now in force is section 37 of part 2, title 3, chapter 6, and was first enacted in the Revised Statutes of 1828 (*See vol. 2 of that edition, page*

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89), and since that time has remained unchanged (*See 7th ed., vol. 3, p. 2300*). This section (37) provides that the court may confirm the report of the referees, "and adjudge costs as in actions against executors." Under this section it is well settled, prior to the old Code of 1848, that in proceedings of this kind the costs as well as the disbursements were in the discretion of the court, and also that the term costs included disbursements (*Robert agt. Ditmas, 7 Wend., 522; Newton agt. Sweet, 4 How., 134*). By the Laws of 1851, section 317 of the Code of 1848 — old Code — was amended by adding the clause \* \* \* "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law," and this is the only provision of law by which the "prevailing party," as a matter of right, has ever been entitled to his disbursements. And all the decisions awarding to the prevailing party his disbursements have been based on this section of the old Code (*Newton agt. Sweet, 4 How., 134; Radley agt. Fisher, 24 How., 404; Munson agt. Howard, 12 Abb., 77*). The Code of Civil Procedure has not retained this provision. The Revised Statutes never contained it. The section of the Revised Statutes unrepealed leaves the question of costs, including disbursements, in the discretion of the court.

BY THE COURT. — The question in this case has, we think, already been decided in this court. But as we are not able at this time to refer to that decision, we will briefly state our reasons for affirming the order.

The clause in the repealing act (*chap. 245, Laws 1880, sec. 3, subd. 8*) does not affect the question because it has reference simply to provisions of the Revised Statutes.

The law granting disbursements as a matter of right is in the Code of Procedure (*sec. 317*).

The Code of Civil Procedure (*sec. 3246*) takes the place of section 317 of the old Code, and does not give disbursements as a matter of right.

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Disbursements then, like costs, are to be awarded by the court, as provided in sections 1835 and 1836, Code of Civil Procedure (*R. S., part 2, tit. 3, chap. 6, sec. 37*). They do not belong to the prevailing party in such cases as a matter of right.

Order affirmed, with ten dollars costs and printing disbursements.

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### SUPREME COURT.

HELEN M. JOHNSON agt. SAMUEL E. JOHNSON.

*Jurisdiction in divorce — When record of foreign court binding upon plaintiff.*

The plaintiff having brought this action for a limited divorce from defendant, the latter set up a divorce obtained by him from her in Massachusetts:

*Held*, that the record of the Massachusetts court is binding upon the plaintiff as it shows all the facts necessary to give that court jurisdiction both of the subject matter and of the parties.

*Special Term, April, 1884.*

*R. Robertson*, for plaintiff.

*Charles W. Brookes*, for defendant.

VAN VORST, J. — This is an action brought by the plaintiff for a limited divorce as against the defendant. The parties were married in August, 1865. There are four children, issues of the marriage. The plaintiff complains that in February, 1876, the defendant abandoned her, and has ever since failed and neglected to either live with her or in any manner to provide for her.

The defendant in his answer sets up and alleges that by the judgment of the supreme judicial court of the commonwealth of Massachusetts, in an action pending in that court in which the defendant in this action was plaintiff and the plaintiff

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herein was defendant, it was on the 4th day of October, 1876, ordered and decreed that the marriage then existing between the parties to that action be dissolved on account of the adultery of the plaintiff herein, and that said marriage was dissolved by such decree. The force and effect of the judgment of the Massachusetts court is the subject chiefly litigated in this action.

By the laws of Massachusetts adultery was at the time of the commencement of the action, in which the decree for divorce was made, a cause for divorce "*a vinculo matrimonii*" (*Genl. Stat. of Mass., chap. 107, sec. 6; Public Stat. of Mass., chap. 146, sec. 1*).

It is claimed on behalf of the plaintiff that she and the defendant had never lived together as husband and wife within the state of Massachusetts, and that neither of them lived there when the husband commenced his action in that state for a divorce. That the process in that action was served upon her within the state of New York, and that by the laws of Massachusetts the courts of that state had no jurisdiction over the parties to grant a valid decree of divorce (*Genl. Stat. of Mass., chap. 107, secs. 11 and 12*).

By the record of the proceedings in the Massachusetts court it appears that the libelant, the defendant in this action, in and by his libel described himself as of Boston, and he alleges that after their marriage, which took place in the state of New York, he and his wife, the present plaintiff, lived together as husband and wife in the commonwealth of Massachusetts, at Pittsfield.

There is some evidence that the defendant in this action was personally living in the city of Boston at the time he filed his libel, although his wife and children were still living within the state of New York, and that he was making arrangements to transact business there; and there is some evidence that he and his wife shortly after their marriage were temporarily living in Massachusetts during some weeks or months. It is claimed on behalf of the plaintiff, however, that they were

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traveling through the state and made only a short stay at Pittsfield.

I do not deem it necessary, with reference to my view of this case, to decide whether or not the libelant actually resided in Boston when he commenced his proceeding there, or whether or not the parties ever lived as husband and wife within the state of Massachusetts. I have come to the conclusion that the record of the Massachusetts court is binding upon the plaintiff, and that it shows all the facts necessary to give that court jurisdiction, both of the subject-matter and of the parties.

It was for the Massachusetts court to determine the question of residence of the parties under the allegations of the libel. *Kinnier* agt. *Kinnier* (45 N. Y., 540) holds that "the question whether he (the libelant) has a residence there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The *status* of all persons within a state is exclusively for that state to determine for itself. A wrong decision does not impair the power to decide or the validity of the decision when questioned collaterally."

I hold that to be decisive of this branch of the case, and its effect is not shaken by the cases which are cited by the learned counsel for the plaintiff. Nor is the objection well taken that the court never obtained jurisdiction for the reason that the process was served upon her within the state of New York. The objection would have been good if the plaintiff had not appeared in the action or proceeding in the Massachusetts court (*Shepard* agt. *Wright*, 59 How. Pr., 512; *Anderson* agt. *Haddon*, 9 Abb. N. C., 289). The record of the Massachusetts court shows that the decree for a divorce was in the first instance obtained upon the failure of Helen M. Johnson to appear. She made default. But it appears that in January, 1877, and within a few months after the decree, the plaintiff in this action filed her petition in the Massachu-

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setts court, asking that the decree might be opened and for further relief. Upon the filing of her petition the court made an order requiring notice of the order to be served upon the libelant and his counsel, returnable on the first Monday of March then next. The libelant appeared by his attorney of record and moved to dismiss the petition. Afterwards, and on the 27th day of March, 1877, the libelee, by leave of the court, discontinued her petition.

The conclusion I have reached is, that this action on the part of the libelee in the divorce suit in Massachusetts, was an appearance in the action or proceeding. Her petition disclosed all the facts necessary to present to the court the question of jurisdiction, and having intervened in that way, she must be deemed to have appeared, and is concluded by the decree. The court gave her full opportunity to present and litigate all the matters disclosed by her petition, and, if there was a wrong, then and there was the time and place to have had it adjusted. The court had ample power to do her justice. That this appearance was after the decree upon her default does not affect the quality of the appearance in substance. The court had got full control of the proceedings and judgment. And having in this way submitted both her person and her cause to the court, she cannot urge that she is a stranger to the proceeding and is not concluded by the result.

It is scarcely necessary to cite cases showing that an appearance in an action gives the court jurisdiction over the person appearing.

For these reasons the plaintiff's complaint must be dismissed.

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## N. Y. COURT OF APPEALS.

VICTOR HEIN, respondent, agt. ALEXANDER V. DAVIDSON,  
appellant.

*Constitutional law — Liability of sheriffs — Code of Civil Procedure, sections  
1421-1425 — Provisions of these sections held to be constitutional.*

Sections 1421 to 1425 of the Code of Civil Procedure, which authorize the substitution of indemnitors to the sheriff as defendants in his place and stead, are not unconstitutional (*Reversing S. C.*, 66 *How.*, 354).

The right of action of the injured party is not thereby taken away or rendered ineffectual, but its enforcement is simply confined to the actual trespasses.

The right to sue a specific individual is not a constitutional right which cannot be taken away where adequate and complete protection to the right of property is left.

*Decided June, 1884.*

THIS action was brought by plaintiff, as assignee, to recover from defendant for a wrongful seizure by him, as sheriff, of the property of his assignor. An order was made at special term substituting in place of the sheriff his indemnitors as defendants under sections 1421 to 1425 of the Code of Civil Procedure, which free the sheriff from liability for a seizure of property when he has taken a bond of indemnity, and the sureties seek to be substituted as defendants. This order was reversed by the general term on the ground that said sections are unconstitutional, as they take away the private property of the citizen without due process of law.

*Morris Goodhart*, for appellant.

*E. More. Jr.*, for respondent.

FINCH, J. — Those sections of the Code which free the sheriff from liability for a seizure of property, where he has taken a bond of indemnity and the sureties seek to be substituted as defendants, are now claimed to be unconstitutional,

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as upon the ground that they take away the private property of the citizen without due process of law. If the property of such person is seized by an officer who holds no process against him, and who therefore is a pure trespasser without authority or jurisdiction for the act, the injured party has his right of action against the wrong-doer. That right is property. It has value; it may be sold or assigned; it will pass to the personal representatives; not only that, but its existence as a right is essential to the idea of ownership in the property seized, for while there may be possession, there can be no real ownership as against one whom the law permits to seize the property with impunity. Against such a person the only possible title is that of force. When, therefore, it is argued the sheriff seizes the property of an individual without process against him, the officer disappears in the man; he becomes liable personally, and any enactment which takes away that liability deprives the citizen of his property without due process of law. There is force in the argument, but other considerations are to be stated and weighed. The provisions of the Code do not take away the injured party's right of action. That remains as such, unchanged in its inherent character, but confined for its enforcement to the real and actual trespassers. The right of action survives the restriction; the ownership invaded is recognized and protected. Neither are taken away, but both are preserved under the sanctions of the law. The right of action is twofold; it may aim at a return of the specific property, or damages for its conversion. Both remedies are left. If there are several trespassers they are liable jointly or severally, but if sued severally there can be but one satisfaction, since there is but one loss and one injury, though committed by several. If the legislature releases one, but leaves the rest liable, it may diminish the certainty of redress, but it does not take away the right of action nor destroy the ownership. The injured party still has his cause of action and can still enforce it; is still owner, with the remedies of an owner. When he sues the sheriff, who has acted on the

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faith of a bond, the suit is really against the sureties, who stand behind the officer. When they are substituted and the officer released, the party bound to answer for the wrong is changed, but the wrong remains and the right of redress is not taken away. The remedy for the wrong is by possibility removed, but in no respect destroyed or made ineffectual. If the injured party sues in replevin it is of little consequence who may be the defendant, since the remedy aims at a recovery of the specific property. If the action is for damages the indemnitors whom the sheriff deemed sufficient for his own safety are put in his place, and if the plaintiff doubts their responsibility the court is armed with power to require ample security, which power it is to be assumed will be justly exercised. What the injured party loses and is deprived of is the responsibility of the sheriff and his bail, but only on the consideration that an adequate responsibility is put in its place. The plaintiff's right to sue to recover his property, or damages for its conversion, continues with its normal force and characteristics, and is affected only by a change in the form of his remedy, which is nevertheless left substantial and effectual. What can be said with some appearance of correctness is that in case of a trespass the remedy of the injured party against the wrong-doer is a part of his right, an element of his property, and so a change of the remedy invades the right. That is true of a case like the present in a very general sense, and if given full scope and range might make unconstitutional the least interference with the remedy. A statute of limitations affects the remedy and through that may indirectly affect the right. It leaves it narrower than it found it, but nevertheless does not change its substantial character. An officer holding an execution valid on its face, but issued upon a judgment in fact void, and levying upon the defendant's goods, is protected by his process, and the injured party is deprived of any remedy against the official trespasser and compelled to sue the real wrong-doer. Are we to say that such doctrine violates the constitution? Is that "due process of law" which is abso-

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lutely void as against the injured party? The man who committed the trespass goes free and the sole remedy is against those who set him in motion, but it has never yet been supposed that as a consequence the constitution was violated. Several cases decided in the courts of another state are commended to our attention (*Fowler agt. Man*, 53 *Iowa*, 42; *Craig agt. Fowler*, 58 *Iowa*, 200). The first of these cases arose on demurrer. The action was brought to recover specific personal property levied upon by a constable who had been indemnified and had filed the bond with the execution. The statute relied upon provided that in such case "the claimant shall be barred of any action against the officer, \* \* \* if the surety on the bond was good when it was taken," and gave only a right of action upon the bond for damages. The courts held that this provision took away utterly the right to recover the specific property, and so hair-loom and articles of personal value beyond their intrinsic worth were liable to be taken without the possibility of recovery. The last of the two cases, however, went further and held the substitution to be unconstitutional as applied to an action for damages merely, but its force is very much weakened by the dissent of two members of the court; and, also, it should be observed that the officer was to be released "if the bond was good when it was taken." At the moment of the substitution the bond might be worthless, although good when first executed, and so in practical effect there would have resulted in possible cases a denial of all remedy, which would be the equivalent of a total destruction of the property right. The question arose again in the same state over the sections which released the officer and substituted the plaintiff in the process (*Sunberg agt. Babcock*, 16 *N. Y.*, 716). But it was carefully pointed out that such plaintiff might be insolvent or non-resident, and was only required as a condition of substitution to give security for the costs. It is not at all certain that if these statutes had preserved to the injured party his substantial rights and left him with a complete and adequate remedy that they would

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have been held to be unconstitutional. We think that the right of the legislature to regulate the Code of Civil Procedure for the enforcement of rights is wide enough to permit it to say when an officer acting under the requirements of that procedure may be sued and when he may not be, provided only that he is not shielded so as to deprive the citizen of adequate remedy for any trespass or wrong. The doctrine of the federal courts has gone so far as to hold that a tax may be assessed without notice to the property owners and collected, although illegal, and his possible remedy by an action in equity to restrain the collection of the tax was sufficient to save the enactment complained of from the condemnation of the fundamental law (*McMillen* agt. *Anderson*, 95 U. S., 37). Here a wider and more abundant remedy exists, and we do not feel safe or justified in saying that the right to sue a specific individual is a constitutional right which cannot be taken away, although adequate and complete protection to the right of property is left.

For these reasons we think the order of the general term should be reversed and that of the special term affirmed, with costs.

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SUPREME COURT.

In the Matter of the Petition of MARTIN T. McMAHON, as receiver of taxes, to enforce payment of the tax for personal property imposed upon THOMAS SULLIVAN and JAMES LEAHEY, executors, etc., of ELIZA MOORE, deceased.

*Taxes on personal property—Liability of executors and administrators for taxes imposed upon personal property in their hands belonging to the estate.*

Allegations that certain charitable institutions which were beneficiaries under the will made frequent demands upon the executors for the payment of their bequests shortly after the admission of the will to probate in 1881, and that such requests were based upon the urgent need of the funds, and that such requests being complied with, the executors when

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notified of the imposition of the tax for the collection of which these proceedings are brought, had no moneys in their hands applicable to the payment of such taxes, is no excuse for the non-payment.

It was the duty of the executors, before appropriating any portion of the estate to charitable purposes, to see that the debts of the estate both to individuals and to the state were provided for, and if they have omitted to do so the court is without power to afford them relief.

*New York Chambers, April, 1884.*

*John J. Townsend, Jr., for receiver.*

*Samuel Untermeyer, for respondent.*

LAWRENCE, J. — This proceeding is brought for the purpose of collecting the taxes imposed for the year 1882. It appears by the affidavit of Mr. Comerford that in the accounting of the respondents, filed in the office of the surrogate March 10, 1883, said respondents charged themselves with the balance on hand of the estate of Eliza Moore, amounting to \$4,284.73, and that the final decree made by the surrogate directed the sum of \$3,279.36 to be paid to the residuary legatee. This decree was filed December 22, 1883. The affidavit of Mr. Sullivan does not show when the personal estate was paid over to the residuary legatee. It alleges that there were no assets of the estate in the hands of the executors, and that they have no funds applicable to the payment of the tax imposed upon the personal property in the year 1883. It does not allege, however, that no such assets were in the hands of the executors at the time of the imposition of the tax, nor is there any pretense that there was any irregularity in the imposition of the tax, or that the notice required by law to be given of the assessment was not duly given and published. The allegation that the charitable institutions which were beneficiaries under the will made frequent demands upon the executors for the payment of their bequests, shortly after the admission of the will to probate in the year 1881, and that such requests were based upon the grounds of urgent need of the funds, and that such requests

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being complied with, the executors, when notified of the imposition of the taxes in 1882, had no moneys in their hands applicable to the payment of such taxes, is no excuse for the non-payment of the tax. It was the duty of the executors, before appropriating any portion of the estate to charitable purposes, to see that the debts of the estate, both to individuals and to the state, were provided for, and if they have omitted to do so the court is without power to afford them relief (*See my memorandum in the case of McMahon, Receiver, &c., agt. Brown, Daily Register, March 18, 1884.*)

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### CITY COURT OF NEW YORK.

CHARLES EDWARD TRACY agt. THE PULLMAN PALACE CAR  
COMPANY.

*Negligence — Sleeping car companies — Loss of property, under control of passenger — When company not liable for.*

While sleeping car companies owe greater duties to their customers than ordinary railroad carriers of passengers, still they can only be held liable for property lost while under the control of the passenger, upon proof of some fault or negligence upon their part, and the mere fact of such loss, unaccompanied by any other proof, raises no presumption of negligence.

*April, 1884.*

*David B. Ogden, for plaintiff.*

*Charles B. Alexander, for defendant.*

HAMILTON COLE, *Referee*.— On February 9, 1883, the plaintiff took a train on the Pennsylvania railroad, leaving Jersey City at nine o'clock p. m., for Washington. He had secured a berth in one of the sleeping cars of the defendant. Upon retiring for the night he took off his coat and waistcoat, put his wallet containing his money and some valuables in the

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left hand pocket of his waistcoat, with his watch, rolled the waistcoat up and put it under the inside pillow of his berth. When the plaintiff awoke in the morning, the watch and waistcoat remained but the wallet was gone. It contained money and valuables amounting in value in all to \$215; and that amount plaintiff seeks to recover in this action.

The cause of the disappearance of this wallet remains a matter of conjecture. No explanation can be given of it. In the evening it is there; in the morning it has disappeared, and at this point the evidence stops.

That this defendant owes duties to those whom it carries is certain. What those duties are it will, I think, be found impossible distinctly to define under a general rule which shall be applicable to all cases. It seems to be well settled in principle and the plaintiff himself concedes that such duties are not those which appertain to innkeepers or common carriers. The defendant, if liable, must be held so upon the ground that it failed to perform its duties towards the plaintiff, and acted negligently on his behalf thereby causing him loss and damage. Now, it clearly appears in this case that there is no evidence of any act of omission on the part of the defendant. So far as appears the car in which the plaintiff had his berth was cared for in the usual way, and no fault therewith was found by plaintiff; and it as clearly appears that there is no evidence in the case of any wrongful act on the part of the defendant. Persons unknown to each other and to the company are expected to be admitted into these cars. The fact that there was one person in the car whom the plaintiff considered of suspicious appearance can hardly be considered an act of negligence on the part of the company. The passing of persons through the car in the morning did not necessarily show, as the plaintiff inferred, that the doors of the car were open, for such passing may well have been confined to the inmates of the car, and the muttering of the porter when the conductor asked him if he had been asleep does not establish that sleep had overtaken him.

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Tracy agt. Pullman Palace Car Company.

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Outside of these matters I fail to find any suggestions, even of negligence, on the part of the defendant. The case is simple; the wallet was there at night, in the morning it had disappeared. Is there anything in this state of facts on which negligence on the part of the company can be predicated? The plaintiff's case is as consistent with the absence as with the existence of negligence on the part of the defendant, and therefore negligence is not proven (*Baulec agt. N. Y. and H. R. R. Co.*, 59 N. Y., 356).

84 The case of *Pullman Palace Car Company agt. Gardner* (29 Alb. L. J., 8) was cited in the supreme court of Pennsylvania upon the argument as maintaining the plaintiff's position. But it appeared in that case that the porter who was left by the conductor to guard the car did not remain at his post, and much stress was laid upon this fact as evidence of negligence on the part of the company. The same general state of facts appeared in *Woodruff Sleeping and Parlor Coach Company agt. Diehl* (84 Ind., 474); and the rule there laid down, and in the cases there cited, was to the effect that a sleeping car company is liable for the want of reasonable care in the protection of the property of its guests.

It is well settled that in the case of passengers upon ordinary cars the company are not in general liable for the articles retained within the custody of the passenger. In *Welch agt. Pullman Palace Car Company* (16 Abb. Pr. [N. Y.], 352) the general term of the superior court of Buffalo laid down substantially the same rule in regard to passengers on a Pullman car. The general term of this court, in *Welding agt. Wagner*, judge McADAM writing the opinion, held that no recovery could be had upon the mere proof of the loss of property by a passenger in a sleeping car. The same was held by judge HYATT *at nisi prius* in *Duncan agt. Pullman Palace Car Company*, and by judge VAN BRUNT, in the common pleas, in *Sewards agt. Pullman Palace Car Company*; and these three later cases seem to me to lay down the true rule.

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Ansonia Brass and Copper Company agt. Conner.

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While it may be conceded that these sleeping car companies owe greater duties to their customers than ordinary railroad carriers of passengers, still they can only be held liable for property lost while under the control of the passenger upon proof of some fault or negligence on their part; and that from the mere fact of such loss unaccompanied by any other proof no presumption of negligence arises. The plaintiff has failed to show in this case any want of reasonable care on the part of the defendant in the protection of his property, and he therefore is not entitled to recover its value.

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### N. Y. COMMON PLEAS.

ANSONIA BRASS AND COPPER COMPANY agt. WILLIAM O.  
CONNER, sheriff, &c.

*Execution — Sheriff's time to return extended by stay of proceedings — When admission made is available upon a new trial.*

An injunction order of the United States court staying the sheriff's proceedings operates to extend the time in which he is bound to make return of the execution by as many days as he was under stay.

An admission made on which a decision of the court is based is available upon a new trial of the action.

*General Term, May, 1884.*

*Before J. F. DALY, LARREMORE and VAN HOESEN, JJ.*

APPEAL by plaintiff from judgment of general term of city court affirming judgment of trial term dismissing complaint.

Action for failure to return execution against Charles G. Wilson's property after sixty days from the receipt thereof. Defenses, among others, that proceedings of defendant were

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Ansonia Brass and Copper Company agt. Conner.

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stayed by injunction issued by the United States district court, as follows:

**"UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK.**

**"In the Matter of CHARLES G. WILSON, a bankrupt.**

***"In Bankruptcy.***

"On reading and filing the annexed affidavit of Charles G. Wilson, who has been declared a bankrupt, it appearing to my satisfaction that said Charles G. Wilson has been adjudicated a bankrupt, a merchant residing and carrying on business in the southern district of New York for more than six months, and that the Ansonia Brass and Copper Company have, by confession, procured a judgment against said bankrupt, and has execution thereon against and have levied upon the property of said bankrupt, and thereby are seeking a preference over the other creditors of said bankrupt, and that Le Post Hubbell, Fred. Hubbell and Dorcas Stiles are seeking to procure a preference, &c.

"Now, it is ordered that said Ansonia Brass and Copper Company, plaintiff in said judgment, and said Le Post Hubbell, Fred. Hubbell and Dorcas A. Stiles, and said William C. Conner, sheriff, their servants, agents, attorneys and employes are, and each of them is, hereby restrained and enjoined from interfering in any way with the said property of said Charles G. Wilson, a bankrupt, not exempt by act of congress approved March 2, 1867, and the acts amending the same, from the operation of said acts, and from any interference therewith until the further order of this court.

"Witness, honorable SAMUEL BLATCHFORD, judge of said court of the United States, at the United States court-room, in the city of New York and district aforesaid, this 27th day of November, 1875.

[L. s.]

"GEO. F. BETTS,

*"Clerk."*

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Ansonia Brass and Copper Company agt. Conner.

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And that said order was granted upon affidavit of the bankrupt, the execution debtor, and was not vacated until December 14, 1875; that the sale of property levied upon by the sheriff was postponed until said order was vacated, and thereafter, on December seventeenth, the property was sold, &c.

*M. P. Stafford*, for appellant.

*Vanderpoel, Green & Cuming*, with *Henry Thompson*, for respondent.

J. F. DALY, *J.*—When this case was last before us on appeal we held that it was prematurely brought; that the injunction order of the United States district court stayed the sheriff's proceedings, and operated to extend the time in which he was bound to make return of the execution by as many days as he was under stay. (*Ansonia B. & C. Co. agt. Conner*, 3 *Civil Pro. R.*, 88.) We so held upon an admission in the case on appeal, made upon the trial by plaintiff, that by order of said district court the sheriff was enjoined and restrained "from all further proceedings under the said execution until the further order of the court, and that said order remained and was in full force and effect until the 14th day of December, 1875. On the new trial that admission seems to have been withdrawn, and the order of the district court was put in evidence; as to which order plaintiff now raises the question whether its legal effect was to stay the sheriff and his proceedings. Why the plaintiff was permitted to withdraw his original admission on which the former decision of this court was based does not appear, for it was available to defendant upon the new trial (1 *Phillips' Ev.*, 524 *marg. p.*; 1 *Greenl., Ev.*, *sec.* 186.) We are now, however, called upon to determine the effect of the order as read in evidence.

The district court had power to make orders enjoining any disposition of the bankrupt's property, in the form and to the effect of the order proved in this case. (*U. S. Rev. Stat.*, 5024.) This particular order forbade interference with the

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Ansonia Brass and Copper Company agt. Conner.

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identical property held by the sheriff. Authorities are cited to show that the court had no power to make such an order except in an action instituted for the express purpose of attacking the judgment (*Smith* agt. *Mason*, 14 *Wall.*, 419; *Marshall* agt. *Knox*, 16 *Wall.*, 551), and that a transferee of the bankrupt so enjoined would not have been liable for a contempt if he disobeyed such an order. (*In re Marter*, 8 *N. B. R.*, 188.) In the case of *Ansonia Brass and Copper Co.* agt. *Babbitt* (8 *Hun*, 157) it was held by the supreme court that notwithstanding an order of the district court enjoining the sheriff from further proceedings he had the right to go on and sell the property, being accountable only for the surplus to the assignee, and was not justified in giving up the property to the United States marshal.

In the same case in the court of appeals (74 *N. Y.*, 395), that court does not go further than to say that the order, "assuming that it was binding on the sheriff, who had no notice of the application for the order and was not heard in respect to it, did not assume to disturb his possession," and that it was his duty to retain the possession and sell the property to satisfy the execution and to take all reasonable means to protect his levy. It is not held that such an order would not excuse the sheriff so far as making his return within the statutory time is concerned if he obeyed and respected it until it was regularly set aside, a course of proceeding which the decent administration of justice required of the officer. That is the only question we have to deal with here, and I am inclined to adopt the views expressed in the city court on this point by chief justice McADAM at general term, and by justice HALL at trial term, that on the mere question whether the time in which the officer was to make his return was extended by the injunction order, no substantial harm resulting therefrom to the execution creditor, courts should hold that he was entitled to the benefit of his obedience to the mandate of the court, notwithstanding any doubts as to its jurisdiction or powers in the premises.

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The Mayor, etc., agt. Ketchum *et al.*

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The judgment should be affirmed, with costs.

Should the appellant desire to have the decision of the court of appeals on the questions of law not definitely settled by its decisions :

1. Whether a stay of the sheriff's proceedings operates to extend the statutory time for making return on the execution ; and,

2. Whether the order in question having been obeyed by the sheriff until regularly vacated, operated as such a stay.

I am willing to make an order authorizing an appeal for that purpose.

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## SUPREME COURT.

THE MAYOR, &C., agt. JOSEPH KETCHUM *et al.*

*Landlord and tenant — Apportionment of rent — Rent cannot be apportioned in respect to time in the absence of a statute or an express agreement to that effect.*

The city leased to the defendants, for wharfage purposes, the south side of pier No. 51, North river, for a term of years, ending in 1875, the rent payable quarterly, on the first days of August, November, February and May. There was a proviso in the lease that the lessors might at any time "set apart for their use any or all of such wharves as they may require," the right to the part of the premises so required to vest in the city for all purposes, on notice being given to the lessees by the comptroller, the rent thereafter to be equitably reduced proportionate to the part of the premises not taken. On the 9th of October, 1873, notice was served requiring the whole of the premises, and the city took possession. In this action to recover the proportionate amount of rent accruing between August first and October ninth:

*Held*, that there can be no recovery, because, in the absence of a statute, or an express agreement to that effect, rent cannot be apportioned in respect to time. The act of 1875, providing for an apportionment of rents, has no application to leases executed before that date.

*New York Circuit, June, 1884.*

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The Mayor, etc., agt. Ketchum *et al.*

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THIS action was brought to recover the amount claimed to be due to the plaintiffs upon an instrument in writing, dated April 25, 1865, whereby they granted, bargained, sold and assigned to the defendants "the wharfage which shall or may arise, accrue or become due between the 1st day of May, 1865, and the 1st day of May, 1875, for the use or occupation by vessels of more than five tons of burthen of \* \* \* the south side of pier number 51, North river;" such instrument contained the following, among other provisions, viz.:

"And it is hereby expressly understood and agreed by and between the parties to these presents, that the said parties of the first part, or their successors, may, at any time during the continuance of these presents, set apart for their use any or all such wharves, docks, piers or slips hereinbefore mentioned, as they, the said parties of the first part, may during the time last mentioned require. \* \* \* It shall be the duty of the comptroller of the city of New York, or the person for the time being lawfully administering the office of comptroller, to notify the said parties of the second part or their assigns, in writing, when any part of the said premises is to be taken by the said parties of the first part or their successors, and from the time of the service of such notice the right to the part of the said premises so required by the said parties of the first part, or their successors, shall vest in them for all purposes. But in every such case it shall be the right of the said parties of the second part, or their assigns, to have an equitable deduction for the future made from the rate of rent in this lease reserved, to be ascertained and settled by the comptroller, or the person lawfully administering the office of comptroller; and the rent to be thereafter paid by the said parties of the second part, or their assigns, shall be the balance remaining after the deduction so made as aforesaid."

There are also covenants on the part of the grantees that they will not assign any of their rights without the written consent of the grantors, and that they will pay the annual

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rent of \$1,500 in equal quarterly payments, on the first days of August, November, February and May. On the 9th of October, 1873, notice was served requiring the whole of the premises, and shortly thereafter the plaintiffs took possession.

Bowne, one of the defendants herein, subsequently commenced an action against the plaintiffs herein to recover damages for such taking possession, claiming that it was a breach of said agreement. The plaintiffs, as defendants in that action, pleaded as a counter-claim their right to recover rent for the quarter ending November 1, 1873. Upon the trial of that action the plaintiff therein was nonsuited, and the judgment recorded was read in evidence in this case.

Upon the trial of this action a verdict was directed in favor of the plaintiffs for \$291.66, being the proportionate amount of rent accruing between August first and October ninth. The case was reserved for further consideration, with leave to plaintiffs to move for judgment on the verdict, and to the defendants to move for a nonsuit, notwithstanding the verdict.

*H. W. Wheeler*, for plaintiffs.

*E. M. Wright*, for defendant Bowne.

*John H. Bird*, for defendant Grant.

VANN, J. — The judgment of the court of common pleas in *Bowne agt. The Mayor, &c.*, was not pleaded by any defendant in this action, and hence is not available as a bar or an estoppel (*Krekeler agt. Titter*, 62 N. Y., 372; *Dalrymple agt. Hunt*, 5 Hun, 111). If, however, it had been formally pleaded, it would have been of no avail, because the defendants in that case, by moving and obtaining a nonsuit as to the plaintiff's cause of action, in effect submitted to a nonsuit as to their own cause of action, pleaded as a counter-claim. There was a virtual discontinuance as to their claim against the plaintiffs, which was not submitted to or

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passed upon by the court. As a plaintiff may take a voluntary nonsuit, so a defendant may decline to submit a counter-claim for adjudication, and in either case a subsequent action may be brought upon the claim (*Jones agt. Underwood*, 35 *Barb.*, 211). A counter-claim that the party is bound to present and litigate in a particular suit or lose the benefit of it is an exception to the general rule and has no application to this action.

The decision in *Bowne agt. The Mayor, &c.*, although not binding as an estoppel, would be valuable as a precedent if the question there decided arose in this case. That action was brought to recover damages for an alleged violation by the mayor, &c., of their agreement, termed a lease, by taking possession of the pier and depriving the lessee of any further use thereof. The court held that the action would not lie, and dismissed the complaint without, so far as appears, stating the ground of its action. The only point necessarily decided, therefore, was that the mayor, &c., had the right, under said agreement, to take possession, which is the theory upon which the plaintiff in this action claims a recovery.

By force of the agreement, and in the manner therein provided, the plaintiffs had the right to take possession of the whole or any part of the premises in question. Upon service of the notice on the 9th of October, 1873, the right to the entire premises vested in them, for all purposes, the same as if no agreement in relation thereto had been made with the defendants. If a part only of the premises had been taken the defendants would, thereafter, have been liable only for an amount of rent proportionate to the part of the premises not taken. As the whole pier was taken, the entire rent ceased from that date, for the enjoyment of the premises is an implied condition on which the tenant is bound to pay rent. The rent already earned, though not payable until November first, has not been paid. There is no provision in the agreement that rent earned but not due when possession is taken by the city shall not become due, or that it shall not be paid.

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The Mayor, etc., agt. Ketchum *et al.*

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The parties provided by their contract that an "equitable deduction for the future" should be made from the rate of rent reserved, but did not provide for any deduction from the rent already earned.

It is well settled that an eviction of a tenant by his landlord from the whole or even from a part of the demised premises, suspends the rent until the possession is restored (*Christopher agt. Austin*, 11 *N. Y.*, 216; *Pendleton agt. Dyett*, 4 *Cow.*, 581). But the eviction, in order to suspend the payment of rent, must be an unlawful eviction, where, by the wrongful act of the landlord, the tenant is deprived of possession (*Id.*; *Lewis agt. Payn*, 4 *Wend.*, 423; *Taylor's Landlord and Tenant*, sec. 378). In such a case the tenant may recover the difference between the value of his lease and the stipulated rent (*Chatterton agt. Fox*, 5 *Duer*, 64). The recovery of part of the premises by title paramount to that of the landlord, termination of the tenancy by the act of God or the law, or by the right reserved, voluntary surrender, &c., are exceptions to the rule, for in such cases it is held that as the landlord is not in fault he is entitled to recover a proportionate part of the rent (*Lawrence agt. French*, 25 *Wend.*, 443; *Carter agt. Burr*, 39 *Barb.*, 59).

In the case under consideration the eviction was not unlawful. The landlord did nothing but what the tenant agreed he might do. The obligation to pay the rent depends upon the enjoyment of the premises or upon the right to enjoy them, but if the tenant by his own contract consents that the landlord may terminate the lease or take possession at will, it seems equitable that he should pay rent to the extent and as long as he occupies. As it was said in *Walker's case* (2 *Coke*, 59, 61, *part 3, fol. 22*): "If a man leases three acres, rendering rent, and the lessor ousts the lessee of one acre, he shall have an action of debt for no part, but if the lessor recovers part in an action of waste or enters into part for a forfeiture or by surrender or by special condition for entry into part, or if part of the land be evicted by title paramount, in all these

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The Mayor, etc., agt. Ketchum *et al.*

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cases the rent reserved of the lease for years, which is a rent service, shall be apportioned." This case seems to have been generally followed and approved, and it may be regarded as settled that where a tenant is evicted without fault on the part of the landlord, the rent will be apportioned. Such apportionment, however, depends upon the extent of the occupation. In this case an apportionment is sought that is based upon the time of occupation. Without any satisfactory reason for the distinction, the rule in such cases seems to be different. "If rent is payable quarterly, and the tenant be turned out before the end of the quarter the landlord loses the rent of the current quarter, for rent will not be apportioned in respect to time (*Taylor's Landlord and Tenant*, 285, sec. 387; *Clun's case*, 10 *Coke*, 128; *Zule agt. Zule*, 24 *Wend.*, 76).

In *Clun's case* there was a lease for fifty years, if the lessor should live so long, and the rent was payable quarterly. The lessor died at about the end of one quarter, and it was held that no action would lie to recover the rent, because the rent "is to be raised out of the profits of the land and is not due until the profits are taken by the lessee; and that is the reason that if the land is evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land."

In *Zule agt. Zule* the term was five years and the rent payable semi-annually, with a reservation by the lessor of the right to sell at any time. The lease was terminated by a sale of the premises about three months before the half-yearly payment became due, and it was held that the lessor could not claim an apportionment of rent, or recover the portion that had accrued since the last rent day, in the absence of a provision in the lease to that effect.

Judge COWEN, speaking for the court, said: "Even where the tenancy was determined by the act of God, as where the lessor was tenant for life, and died intermediate the rent days, the rent could not be apportioned, hence the statutes (11 *Geo.*

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The Mayor, etc., agt. Ketchum *et al.*

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2, chap. 19, and 1 R. S., 738, sec. 22). The objection is stronger again against the lessor who puts an end to the lease by his own act without necessity. It is enough to say, however, that there is no special provision either in the lease or by statute, and without one or the other rent can never be apportioned in respect to time."

In *Nicholson* agt. *Munnigle* (6 Allen, 215), it was held that a landlord who, in pursuance of a written lease, has terminated the tenancy between the rent days, could not maintain an action for rent under the lease, or an action of assumpsit for use and occupation of the premises after the last rent day, prior to such termination of the tenancy. The result is the same where there is a voluntary surrender of the lease to the landlord before the rent of the current quarter becomes payable (*Young* agt. *Peyser*, 3 Bosw., 308).

The same rule prevails in equity as at common law. Judge STORY says: "No apportionment in respect to time was in any case admitted by the common law; and this severe doctrine, artificial and unjust as it seems to be, was scrupulously followed in equity" (*Story's Eq. Pr.*, sec. 476).

The act of 1875 (chap. 542), which provides for an apportionment of rents, annuities, dividends and other payments, according to the time which shall have elapsed since the last payment became due, has no application to the lease in question, which was executed in 1865.

I am of the opinion that there can be no recovery in this case, because in the absence of a statute or an express agreement to that effect rent cannot be apportioned in respect to time. While the premises in question may not be regarded as real estate for some purposes (*The Mayor, &c.*, agt. *Mabie*, 13 N. Y., 15) they have been held to be real estate for other purposes (*Smith* agt. *The Mayor, &c.*, 68 N. Y., 552), and from their nature and the language used in the lease and notice to terminate the same I think they must be considered real estate for the purposes of this action.

The clause in the lease providing for an equitable deduction

Brady agt. Kingsland.

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for the future from the rate of rent applies only when a part of the premises has been taken, and refers to an apportionment based on the extent and not upon the time of occupation. The rent would be still so much per year, payable quarterly. The price of the use per day would be less, while in this action the plaintiffs seek to recover the same price per day, but for a period less than a quarter, or at the same rate for a shorter time. By no other construction can adequate force be given to the word rate.

The verdict must be set aside, and under the right reserved a nonsuit entered.

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### N. Y. COMMON PLEAS.

THOMAS E. BRADY agt. WILLIAM M. KINGSLAND.

SAME agt. CAROLINE M. MACY.

*Referees' fees in foreclosure actions — How to be taxed — Referees cannot make a valid contract for more than statutory fees.*

Referees to sell in foreclosure are entitled to nothing more than the fees that are prescribed by the act of 1869 (and 1874), and cannot make a valid contract for the payment of more than the statutory fees.

*General Term, May, 1884.*

*Before LARREMORE, VAN HOESSEN and J. F. DALY, JJ.*

PLAINTIFF, as assignee of Chauncey S. Truax, sued for services as referee to sell in foreclosure under an express agreement. The defense, among others, was payment in full. Several adjournments were had and then the property was sold at private sale. Further facts appear in the opinion.

*William Whaley, for defendants and appellants.*

*Stephen L. Brdque, for plaintiff and respondent.*

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 Brady agt. Kingsland.
 

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VAN HOESSEN, J. — The disbursements of the referee for publishing the notices of the sale were eighty-one dollars. These were properly allowed. The justice also awarded the plaintiff the maximum sum allowed by the law for the full performance of all the duties that are devolved upon a referee who conducts a sale in foreclosure, to wit, fifty dollars. The account then stood thus:

Disbursements.....	\$81 00
Fees .....	50 00
	<u>\$131 00</u>
<i>Cr.</i>	
By cash.....	\$100 00
	<u>\$31 00</u>
Balance.....	<u><u>\$31 00</u></u>

For the sum of thirty-one dollars the justice gave judgment. In this, I think, he erred. The referee was entitled to nothing more than the fees that are prescribed by the act of 1869 (*Schermerhorn* agt. *Prouty*, 80 *N. Y.*, 317; *Lockwood* agt. *Fox*, 61 *How. Pr.*, 522; *Maher* agt. *O'Connor*, 61 *How. Pr.*, 103; *Guinnever* agt. *Carroll*, 4 *L. Bull*, 6).

His disbursements were.....	\$81 00
For receiving order posting notice of sale.....	10 00
Not more than three adjournments .....	9 00
	<u>\$100 00</u>
Total.....	<u><u>\$100 00</u></u>

It appears, therefore, that the referee has been paid in full. The referee could not make a valid contract for the payment of more than the statutory fees. The law condemns and will not lend itself to the enforcement of such contracts. We do not feel called on to review the decisions that have been made respecting the binding force of the act of 1869. I have carefully read the argument of the counsel for the plaintiff, but I am not at all convinced that the act is unconstitutional.

The judgment should be reversed.

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Estate of Meyer.

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J. F. DALY, *J.* — I have some doubts as to the constitutionality of the act of 1869 and 1874, that question being now directly raised, but I am constrained to follow our general term in *Lockwood* agt, *Fox* (61 *How.*, 522).

LARREMORE, *J.*, concurred for reversal.

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## N. Y. SURROGATE'S COURT.

In the Estate of JOHN S. MEYER, deceased.

*Executors and administrators — Their commissions, how and when allowed —  
When chargeable with interest.*

It is provided by the Revised Statutes (*part 2, chap. 6, title 3, art. 3, sec. 58* [*3 Bank's 7th ed.*, 2308]), that "*on the settlement of the account*" of an executor or administrator he shall be allowed for his services certain commissions.

Such officer is chargeable with interest on sums appropriated by him in payment of commissions in advance of their allowance by the surrogate. Where an administrator, in January, 1878, deposited to his own credit in a bank certain moneys belonging to the estate, where they were mingled with his own funds:

*Held*, that if the withdrawal of such moneys by the administrator and his deposit of that sum to his private account is to be deemed an appropriation by him of his commissions, he should be held accountable for interest thereon.

And if he is not to be regarded as having practically transferred these funds to himself under a claim of right, but rather as having held them as estate funds to be accounted for, then he is chargeable with interest for having failed, since January, 1878, to make such use of them as would result in some advantage to the estate.

*June, 1884.*

ROLLINS, *S.* — The account of the administrator and administratrix of this estate shows that they have in their hands a balance of \$2,918.38.

I am asked to determine whether, under the circumstances disclosed by the evidence, they are chargeable with interest upon that amount or upon any portion thereof.

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Estate of Meyer.

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It appears by the testimony that, in March, 1876, the business of administering this estate was nearly completed. Its cash assets then amounted to about \$1,763.48. It had, besides, an unsettled claim which, in February, 1882, was compromised with the sanction of the surrogate, and from which the administrator received, in March, 1882, the sum of \$1,147. There subsequently came to his hands from another source eight dollars and seventy cents. The aggregate of these three sums constitutes the balance wherewith the accounting parties charge themselves.

On January, 25, 1878, the aforesaid sum of \$1,763.48 was deposited by the administrator to his own credit in the Irving Bank. It was there mingled with his own funds, from which it has never since been separated. The testimony shows that he at no time received any interest from this deposit. Whether the balance to his credit has ever fallen below that amount is not disclosed, but he testified that his check for the full sum would have been honored at the bank whenever presented. He seems to have thought that, though it was yielding no income for the estate, he was at liberty to retain it on private deposit because it was but slightly in excess of the sum awardable as administrator's commissions, and as probable expenses of an accounting whenever such accounting should take place.

It is provided by the Revised Statutes (*part 2, chap. 6, title 3, art. 3, sec. 58* [3 *Banks' 7th ed.*, 2303]) that "*on the settlement of the account*" of an executor or administrator he shall be allowed for his services certain commissions. It has been repeatedly held that such an officer is chargeable with interest on sums appropriated by him in payment of commissions in advance of their allowance by the surrogate (*Freeman* agt. *Freeman*, 4 *Redf.*, 211; *Whitney* agt. *Phoenix*, 4 *Redf.*, 195; *Wheelwright* agt. *Roades*, 28 *Hun*, 57; *In re Bogart*, *Surrogate's Decisions*, 1882, p. 184; *In re Cushman*, *Surrogate's Decisions*, 1883, p. 544).

If, therefore, the withdrawal by the administrator of the

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Estate of Meyer.

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\$1,763.48, and his deposit of that sum to his private account is to be deemed an appropriation by him of his commissions, it is clear that he should be held accountable for interest thereon. And, on the other hand, if he is not to be regarded as having practically transferred these funds to himself under a claim of right, but rather as having held them as estate funds to be accounted for, then he is chargeable with interest for having failed since January 25, 1878, to make such use of them as would result in some advantage to this estate (*Dunscomb* agt. *Dunscomb*, 1 *Johns. Ch.*, 508; *Gilman* agt. *Gilman*, 2 *Lans.*, 1; *Hasler* agt. *Hasler*, 1 *Brad.*, 248; *Harrington* agt. *Libby*, 6 *Daly*, 259).

Interest, however, should be calculated at less than the legal rate. The fund in the administrator's hands was so small as not to invite very favorable investment. Under all the circumstances, he would, I think, have discharged his full duty if he had kept them on deposit in one of the trust companies of the city. The interest may be computed at three and one-half per cent (*Livermore* agt. *Wortman*, 25 *Hun*, 341).

Upon the sums which have come to the administrator's hands since the account was filed I decline to hold him chargeable with any interest whatever. The administrator does not seem to have been specially responsible for delay in the conduct of the proceedings, and was justified in keeping those sums where he could produce them at once in response to a demand for their production.

The circumstances attending the management of this estate have been somewhat peculiar. The duties of the administrator have been laborious and embarrassing. He found the affairs of the decedent in great confusion. Mr. Meyer was a builder and left many unfinished contracts which the administrator was authorized to complete.

In the conduct of his trust it appears by his testimony that from time to time he made considerable advances of money. He claims that an interest account between himself and the estate would show a balance in his favor. The extent

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of those advances and the time when they were made do not appear in the evidence taken by the referee. In view of the fact that the administrator has been admittedly diligent and faithful in the discharge of his duties he will be afforded opportunity, if he wishes it, of establishing his claim in this regard.

If he does not care to avail himself of this permission, an order may be entered confirming the report of the referee, except as hereinbefore modified.

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### CITY COURT OF NEW YORK.

JAMES WALSH agt. CHARLES SCHÜLZ, impleaded.

*Bail — Exoneration by death of principal — Application must be made before time to answer expires — Code of Civil Procedure, sections 600, 601.*

Where the bail apply to be exonerated on account of the death of their principal, the application must be made before their time for answering expires.

*Special Term, June, 1884.*

MOTION to exonerate bail.

McADAM, C. J. — Section 191 of the old Code of Procedure re-enacted the cases for exonerating bail provided for in the Revised Statutes, as amended by the act of 1845 (*Chap. 231; Levy agt. Nicholas, 19 Abb. Pr., 282; S. C., 1 Robt., 614*). Sections 600 and 601 of the present Code of Civil Procedure were substituted for the provisions of law previously in force on the same subject. The determination of the present application depends, therefore, upon the construction to be placed on those sections. Section 600 provides that in certain specified cases the court may, "before the expiration of the time to answer," and upon notice to the

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adverse party, make such an order for the relief of the bail as justice requires. Section 601 provides that, except in an action to recover a chattel, the bail must be exonerated when either of the following events occur "before the expiration of the time to answer," in an action against them: 1. The death of the original defendant. 2. His legal discharge from the obligation to render himself amenable. 3. His surrender to the sheriff of the county, &c. The same section also provides, that "where either event occurs, after the commencement of the action against the bail, the court may, in its discretion, impose the plaintiff's costs and expenses, incurred after the return of the execution against the person as a condition of allowing the exoneration."

The first portion of section 601, therefore, enumerates the events in which the discharge must be granted, one at least of which must occur "before the expiration of the time to answer;" and the second portion of the same section, interpreted in harmony with it, is by necessary implication made to read, "where either event occurs after the commencement of the action against the bail (and before the expiration of the time to answer), the court may, in its discretion, impose the payment of costs, &c. This is in accord with the rule of interpretation of statutes which requires that all the parts must be made consonant to each other; that which follows with what went before (*Potter's Dwarries on Statutes*, 128), and is also in harmony with the practice which prevailed under the Revised Statutes of requiring the bail, where they applied for exoneration after suit brought, to pay the costs of the action. That it is the proper construction is evidenced by the balance of the section, which reads, "and the court may by an order made on notice to the adverse party grant such further time as it deems just after answer for the surrender of the original defendant. In that case his surrender within the time so granted has the same effect as if it had been made before answer." The provision of the Code last referred to demonstrates that "after answer" the surrender of the original

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defendant is the only ground upon which the bail may be exonerated; and they can be exonerated (after answer) only in cases in which the time to make the surrender has been extended by order of the court. This provision gives the court a discretion to exonerate the bail at any time pending the action on surrendering the principal, but it does not give such power or discretion in case the defendant dies or is legally discharged so that he cannot be surrendered. There may be reason for this distinction, for according to the terms of the bail-piece the plaintiff is entitled to the body of the debtor or the money. The legal effect of the bond is that the plaintiff shall have one or the other. The penalty may be severe, but it is a risk the bail have voluntarily assumed. It would have been absurd to have inserted in the Code a provision granting time for the principal to die, or to be otherwise legally discharged, because these are acts which the bail cannot ordinarily control. The surrender of the original debtor is a thing they might eventually accomplish, for the old theory was the bail have their principal upon a string, and may pull the string whenever they please (6 *Modern R.*, 231, 247). Later experience has shown that some debtors, like certain fish, require longer and stronger lines and efforts than others to bring them under proper control, and hence the provision in regard to granting time to the bail to make every honest effort to recapture and surrender their principal was inserted. As the Code contains the only authority for exonerating bail they must bring themselves within its provisions or the application for exoneration must be denied. Under the Revised Statutes the limitation of eight days after the return of a *ca. sa.* (2 *R. S.*, 383, *sec.* 34) for the exoneration of bail was not only regarded a statute of limitations, but a period fixed by a statute, within which only it could be done (*Graham's Pr.* [2d ed.], 434; 2 *Paine & Duer's Pr.*, 31, 32; 1 *Comyn's Dig.*, title "*Bail*," 5; *Rawlinson agt. Gunston*, 6 *Term R.*, 284). The court has no more power to extend the time than it has to extend the statute of limitations or the time

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to appeal. There are many actions and rights given by statute, provided they are brought or asserted within a limited time, which the courts have no power to allow afterwards (*For examples see Jackson agt. Wiseburn*, 5 *Wend.*, 136; *Caldwell agt. The Mayor*, 9 *Paige*, 572; *Bank of Monroe agt. Widner*, 11 *id.*, 529; *Wait agt. Van Allen*, 22 *N. Y.*, 321; *Humphrey agt. Chamberlin*, 11 *id.*, 275; *Grout agt. Cooper*, 9 *Hun*, 326; *Jackson agt. Wood*, 24 *Wend.*, 443; *Selover agt. Coe*, 63 *N. Y.*, 438; *Nat. St. Bank agt. Boylan*, 2 *Abb. N. C.*, 216). It is practically the same in regard to the right of bail to be exonerated. Prior to the statute the rule was if the principal died at any time before the return of the *ca. sa.* the bail was discharged: but if he died after the *ca. sa.* was returnable, although before the return was filed, the bail were charged and the court could not relieve them (2 *Paine & Duer's Pr.*, 31). The Revised Statutes relaxed this rule by allowing the bail eight days after suit brought within which to seek exoneration, and now the Code extends the time to apply for exoneration in case the principal dies "before the time to answer expires," but not afterwards. The bail in the present case answered without applying for exoneration, and the principal died after the time for answering herein had expired. According to the Code, as I have interpreted it, the application was not made in time, the statute has run against the right to apply for exoneration, there is no power in the court to extend the time and the application to exonerate the bail must be denied.

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## N. Y. COMMON PLEAS.

JAMES EDWARDS, plaintiff and appellant, agt. LYMAN N.  
JONES, defendant and respondent.

*Master and servant— When master liable for injury by acts of servant—  
Negligence.*

If the servant, within the scope of his duty, enables another by his assent to injure a third person, the master is liable, but when there is no evidence of such assent there is no cause of action against the master. Assent in such case will not ordinarily be inferred.

*General Term, May, 1884.*

*Before DALY, C. J., BEACH and LARREMORE, JJ.*

THE plaintiff sued in the late marine court to recover \$150 damages for injuries said to have been done to his canal boat by the negligence of the defendant.

The complaint, in setting out the cause of action, alleges "that on or about the 14th day of February, 1882, the plaintiff arrived at the coal yard of the defendant at One Hundred and Twentieth street, East river, with his said canal boat and a cargo of coal, consigned to said defendant. That thereupon, the defendant, his agents, servants and employes commenced to discharge the said cargo of coal from the said canal boat into the said defendant's yard." That on the 16th of February, 1882, while unloading said cargo, the coal bucket, by means of which the coal was being removed, fell violently upon the plaintiff's boat, doing the damage claimed. The plaintiff then charges that the bucket fell through the negligence of the defendant and his employes, and not by or through any fault on the part of the plaintiff or his employes.

The answer is, in substance, a denial of each and every allegation in the complaint contained, excepting that the cargo of coal was received by the defendant and that he proceeded to unload the same into his yard. The action was tried Novem-

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ber 9, 1882, before Mr. justice McADAM and a jury. It appeared by the evidence that the defendant employed a person by the name of Scott to assist the plaintiff's servants in unloading the boat and that defendant was to pay Scott for such services "so much a ton." Scott proceeded to assist the plaintiff's servants, and during the progress of the unloading Scott left a horse which he had been previously driving in the unloading, and went to the water closet and was absent about ten or fifteen minutes; and after Scott left and while he was absent a strange man, who was not known to any of the parties or witnesses and who was not working there, came and took hold of the horse and, under orders from the plaintiff's servant, started the horse and thereafter lifted a spring and caused the tub to fall which produced the injury. At the conclusion of the trial the justice dismissed the complaint, writing the following opinion:

McADAM, J.—The person guilty of the negligent act which injured the plaintiff's boat was not the servant of the defendant, but a volunteer, who, without the defendant's knowledge, undertook to take charge of the horse during the servant's temporary absence. If the volunteer had merely assumed charge of the horse no damage would have ensued. But the volunteer went further; he drove the horse and touched the spring which caused the damage. The defendant not having selected the volunteer, is not answerable for his competency or misconduct. In *Booth agt. Mister* (7 Car. & P., 66) the defendant's servant allowed a stranger to drive the horse, and the court said: "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant held them himself." In *Althorf agt. Wolfe* (22 N. Y., 352) the servant and volunteer were both present when the damage was done, and the court, following the case last cited, held that the master was liable. In *Simons agt. Miller* (29 Barb., 420) the servant was employed to do a specific act, and the

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master was held liable for the negligence of the servant's son, who acted by the servant's direction in performing it. The court was careful, however, not to extend the rule further than the necessities of that case required, and said: "The case would have stood entirely different had the son been employed by the father to do the work generally, which it was the duty of the father, as the defendant's servant, to perform, and had he while so employed, of his own volition, and without the knowledge or direction of the father, set the fire in question. The son, under such circumstances, being the servant of the father, and not of the defendant, his act would have been chargeable upon the father as master, and not upon the defendant. The negligent act in that case would have been the act and negligence of the son, and in no sense that of the father, except by mere legal relation; and as the defendant never selected him, nor authorized any one to do so on his behalf, and never intrusted any business to his management or discretion, there could be no ground on which to charge the defendant with his negligent acts. The court assigns as a reason for this, that "the legal relation upon which the master's liability rests would in such case be entirely wanting." It is noticeably wanting in this case. The master selected his servant and intrusted the work to him presumably on account of his experience. The volunteer who took charge of the horse during the servant's temporary absence undertook to experiment with him, and made the mistake which the servant's experience would undoubtedly have prevented had he been present. The plaintiff's servant assisted in the experiment and is culpable, to a limited extent at least. The evidence failed to show that the defendant did anything which, under the circumstances, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken, observed or performed. There was no solid legal ground for holding the defendant liable, and the complaint was properly dismissed.

From the judgment entered upon this dismissal the plain-

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tiff appealed to the general term of that court, which, on May 22, 1883, affirmed the judgment; and from the judgment entered on that affirmance the plaintiff appealed to the general term of the court of common pleas for the city and county of New York.

*J. A. Hyland*, for plaintiff and appellant:

I. Defendant is liable for the damages occasioned by the happening of the accident (*Wood's Master and Servant*, sec. 308; *Suydam* agt. *Moore*, 8 *Barb.*, 358; *Simons* agt. *Monier*, 29 *Barb.*, 419; *Booth* agt. *Mister*, 7 *Carrington & Payne*, 66; *Althorp* agt. *Wolfe*, 22 *N. Y.*, 355; *Gleason* agt. *Amsdell*, 9 *Daly*, 393; *Sherman & Redfield on Negligence*, secs. 70, 71; *Lyons* agt. *Rosenthal*, 11 *Hun*, 46; *Mullen* agt. *St. John et al.*, 57 *N. Y.*, 567).

II. There was a duty imposed upon the defendant which rendered it imperative that he properly discharge the plaintiff's boat. Where by contract or by statute the master is bound to do certain things, if he intrusts that duty to another he becomes absolutely responsible for the manner in which the duty is performed, and that without any reference to the question whether the servant was authorized to do the particular act (*Wood on Master and Servant*, sec. 321).

III. It was error to refuse to allow the case to go to the jury. The accident raised a presumption of negligence on the part of the defendant, for which he is liable (57 *N. Y.*, 567; 11 *Hun*, 46; *Sherman & Redfield on Negligence*, sec. 71). In determining the propriety of a nonsuit, the court is legally bound to assume the truth of the fact which the testimony of the plaintiff legitimately conduces to prove, although their correctness may be controverted by the defendant's witnesses (64 *How. Pr. R.*, 126).

*James Wiley*, for defendant and respondent; *Amour C. Anderson*, of counsel:

I. The plaintiff and defendant were both absent at the time

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of the accident. In order to establish a liability against the defendant, it therefore became necessary for the plaintiff to make it appear, 1st. That some *employe* of the defendant committed the negligent act. 2d. That the plaintiff's employe, who assisted in the act, was entirely free from fault. The same rule of law which makes the defendant responsible for the acts of his employe, applies with equal force to plaintiff in respect to his employers (*Wharton on Negligence*, secs. 157, 158).

II. The rule which makes one person responsible for the acts of another is founded on the maxim *qui facit per alium, facit per se*, and is based on the theory of agency, but neither the principle of the rule nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned (*Wharton on Negligence*, sec. 157, and cases cited). In cases like the present one the *onus propandi* is on the plaintiff to make out his case by clear, clean, affirmative evidence. His case is not to be presumed, but must be proved (*Baulec agt. The N. Y. and H. R. R. Co.*, 59 *N. Y.*, 366; *Fleming agt. Northampton Nat. Bank*, 62 *How.*, 178; *Paine agt. Forty-second Street R. R. Co.*, 40 *N. Y. Supr. Ct. R.*, 8; *Boniface agt. Relyea*, 36 *How.*, 457; *Stevens agt. Armstrong*, 6 *N. Y.*, 435; *Kunz agt. Stewart*, 1 *Daly*, 431). The rule is, that where the circumstances admit of two inferences, either of which is equally probable, one in favor of plaintiff and the other in favor of the defendant, plaintiff should be non-suited (*Cordell agt. N. Y. C. and H. R. R. Co.*, 75 *N. Y.*, 330-332; *Kenny agt. N. Y., M. B. R. R. Co.*, 13 *Week. Dig.*, 61; *Clafin et al. agt. Meyer*, 75 *N. Y.*, 260; *Sheldon agt. The H. R. R. R. Company*, 49 *Barb.*, 226; *Lehman agt. The City of B.*, 49 *Barb.*, 234; *Baulec agt. The N. Y. and H. R. R. Co.*, 59 *N. Y.*, 366). The cases cited and relied upon by the appellants (*Suydam agt. Moore et al.*, 8 *Barb.*, 359; *Simons agt. Monier*, 29 *Barb.*, 419; *Booth agt. Mister*, 9 *Car. &*

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*Payne*, 66; *Althorf* agt. *Wolfe*, 22 *N. Y.*, 355; *Gleason* agt. *Amsdell*, 9 *Daly*, 393) are not parallel cases and do not help the appellant. If, as judge McADAM says, Scott and the strange hand had both been present, one assisting the other, the defendant might have been held, because the principal in that event would have had the benefit of his agent's skill and care. But where, as in this case, the agent or servant was absent, he could not delegate his authority by substituting a new agent in his place and stead (*Story on Agency*, secs. 13, 14; *Ewell's Evans' Agency*, 51). The maxim is *delegata protestas non potest delegari*. Scott was an "independent contractor;" and the employment being a lawful one, which might have been performed without injury to others, the person employing the contractor is not responsible for the acts of the latter, nor for those acting under his orders (*See Wood on Master and Servant*, sec. 314, and notes; *Kelly* agt. *The Mayor et al.*, 11 *N. Y.*, 432; *After new trial*, 4 *E. D. Smith*, 291; *McCafferty* agt. *The S. D. and P. M. R. R. Co.*, 61 *N. Y.*, 178; *Burgmeister* agt. *The N. Y. and E. R. Co.*, 12 *Weekly Dig.*, 208; *King* agt. *N. Y. C. and H. R. R. R. Co.*, 66 *N. Y.*, 181; *Town of P.* agt. *Loveless*, 72 *N. Y.*, 211; *Scanlon* agt. *Carroll*, 1 *City Court R.*, 351).

BEACH, J. — The difficulty with the plaintiff's case, causing a dismissal of his complaint by the learned justice of the city court presiding at trial term, did not arise from weakness in legal position, but for want of sufficient evidence to make a *prima facie* case upon the facts.

The plaintiff was bound to produce proof authorizing the jury to find that the person in charge of the defendant's hoisting apparatus sustained a relation to the defendant which would not make the defendant responsible for his negligence. If he failed in this there could be no question for the jury. The evidence upon this point was given by the witness Bray and is brief enough for quotation. He says: "The regular driver went away to the water closet and left a strange hand

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at it; the strange man let it go before he was told, and the tub fell and it came right down on the boat." On cross-examination he testifies: "He (the defendant's driver) left it (the horse) and then a strange man took hold." Again: "Q. And while he was gone this strange man came and took hold of the horse and lifted the spring and started it and then the tub came down? A. Yes, sir."

The testimony does not show the stranger assumed control with the knowledge or assent of the defendant's servant. One part would support such a conclusion, another is equally strong in favor of the defendant's servants having been ignorant of the stranger's act. In the one case the defendant would have been liable for the stranger's negligence, he having been left in charge by defendant's servant (*Simons* agt. *Monier*, 29 *Barb.*, 419; *Althorf* agt. *Wolf*, 22 *N. Y.*, 385; *Gleason* agt. *Amsdell*, 9 *Daly*, 393). If the servant, within the scope of his duty, enabled another by his assent to injure a third party, the master is liable. In the other view, *i. e.*, that the stranger took control of the hoisting apparatus without the knowledge or assent of the regular driver, the defendant would not be liable, the stranger being an intruder or volunteer. This distinction, in my opinion, is clearly deducible from the authorities cited. The plaintiff failed to give evidence authorizing a finding that the strange man took charge with the driver's knowledge. The proof was quite as potent in support of the driver's ignorance. For this reason it was right to dismiss the complaint.

The judgment should be affirmed, with costs and disbursements.

DALY, C. J., and LARREMORE, J., concur.

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Brisbane agt. Brisbane.

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## SUPREME COURT.

LODOISKA M. BRISBANE agt. ALBERT BRISBANE.

*Divorce — Punishment for contempt — Power of the court to strike out a defendant's answer who is in contempt in not paying alimony and counsel fees — Code of Civil Procedure, secs. 1773 and 2281.*

The provisions of the Code of Civil Procedure for fine and imprisonment of a husband in default for non-payment of alimony do not interfere with or restrict the power of the court to strike out the answer of a disobedient defendant in a divorce suit.

*Kings County Special Term, June, 1884.*

*Brewster Kissam*, for plaintiff.

*F. H. Van Vechten*, for defendants.

BARTLETT, J.— This is a motion to strike out the answer unless the defendant shall, within five days, pay to the plaintiff the counsel fee and alimony he has heretofore been ordered to pay. There is no controversy before me as to the facts. An order has been duly made requiring the defendant to pay alimony at the rate of twenty-five dollars a week and a counsel fee of \$500. In March last the defendant was personally served with a copy of this order and a demand was made upon him for payment of the sum due at that time thereunder then amounting to \$1,625. He paid nothing, and the moving papers indicate that he has kept out of the state since then to avoid making payment under the compulsory process of the court. His counsel does not contradict the allegations to this effect, but relies solely upon the objection that the court has no power to punish the defendant for his disregard of its formal order by now striking out his answer.

The power thus questioned undoubtedly exists unless it has been taken away by competent legislation since the orders were made which were reviewed by the court of appeals in

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the case of *Walker* agt. *Walker* (32 *N. Y.*, 260). These orders were similar to that which the plaintiff seeks in the present suit, and were sustained on the ground that the supreme court of this state on its equity side has all the power and authority that formerly belonged to the court of chancery in England, and that the power to refuse to hear a defendant when he was in contempt had long been exercised by that tribunal.

But the defendant's counsel argues that the court has been deprived of this power by the second part of the new Code of Civil Procedure (*chaps.* 14 to 22), which went into effect after the orders were made which were the subject of review in the *Walker* case, and he refers to sections 1773 and 2281 as prescribing the only course now permitted by law in such a case as the present.

I do not think these provisions were intended to affect the chancery power to disregard the answer of the defendant, who is in contempt. It is true that section 1773 does provide for proceedings under title third of chapter 27 of the Code to punish a husband in default for non-payment of alimony, and under section 2281, which is included in that title, a fine or sentence of imprisonment, or both, may be inflicted upon him. So far as punishment by fine or imprisonment is concerned he must now be proceeded against as prescribed in that portion of the Code. I find nothing, however, to indicate an intention on the part of the legislature to protect parties who are thus punishable against other and different consequences of their contempt, when those consequences do not involve fine or imprisonment, and are such as have heretofore been visited upon disobedient parties in the exercise of the established powers of the court.

This view renders it unnecessary to consider the question whether the power here invoked is one of those inherent powers of the court under the constitution, which the legislature cannot take away by statute. I do not think the legislature has tried to take it away.

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In my opinion the decision of the court of appeals, in *Walker* agt. *Walker*, already cited as to the power of the supreme court to strike out the answer of a disobedient defendant in a divorce suit, is a statement of the law on the subject as it exists to-day, no less than of the law as it existed at the time the orders there in question were made.

A proper case for the exercise of the power is presented on this application, and the motion of the plaintiff should be granted.

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### N. Y. COMMON PLEAS.

JAMES WALSH agt. CHARLES SCHULZ, impleaded, &c.

*Appeal—Discretionary orders made by the city court not appealable to the New York common pleas.*

The common pleas in reviewing orders upon appeals from the city court, like the court of appeals in reviewing orders on appeal from the superior city courts, decline to review the discretion exercised by the court below. Where the order involves a question of discretion in the court below it is, therefore, not appealable.

If an appeal be taken in such a case it will be dismissed.

*General Term, May, 1884.*

*Before VAN BRUNT, VAN HOESSEN and DALY, JJ.*

APPEAL from an order of the city court, general term, affirming an order made by Mr. justice McADAM opening a judgment entered by default.

*J. H. Benn*, for appellant.

*Charles Wehle*, for respondent.

VAN HOESSEN, *J.*—The language of section 3191 differs in some particulars from that of section 190, but the differences do not affect the matters under consideration. It is well set-

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tled that with respect to the marine court that the court of common pleas occupies the same position that the court of appeals holds with respect to the supreme court and the superior city courts. The rules that govern the court of appeals in passing upon appeals from the supreme and the superior city courts are applicable to the court of common pleas. This has been universally understood since the decision in *McEteere* agt. *Little* (8 *Daly*, 167) and *Schwartz* agt. *Oppold* (74 *N. Y.*, 307). If, therefore, we ascertain the course that would be taken by the court of appeals, if this appeal was before it, we shall have a guide to the decision of the question before us.

The case of *Lawrence* agt. *Farley* (73 *N. Y.*, 187) is conclusive upon the point that the court of appeals will not review the discretion of a court of original jurisdiction. In the case cited a judgment by default was entered against the defendant in 1862. In 1874 a judgment for a deficiency was docketed against the defendant, and more than two years afterwards the defendant applied for the opening of the judgment and gave excuses for suffering the default that were satisfactory to the supreme court, which opened the judgment and allowed the defendant to interpose an answer. From this order an appeal was taken to the court of appeals, which dismissed the appeal on the ground that the order was discretionary, and that the court of appeals being a tribunal created for the examination of questions of law (save in a few cases specially provided for) ought to refrain from matters of discretion which are likely to involve intricate controversies respecting matters of fact. To the same effect are *Howell* agt. *Mills* (53 *N. Y.*, 331) and *Alling* agt. *Fahy* (70 *N. Y.*, 571).

As I have already said the court of common pleas is, with respect to the marine court, in the position of an appellate tribunal charged (save a few cases specially provided for) with the sole duty of reviewing questions of law; and the same reason that prevents the court of appeals from reviewing matters resting in the discretion of other courts applies with full

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Farwell *et al.* agt. Furniss.

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force to appeals brought into this court from discretionary orders made by the marine court.

There is nothing in the amendment to section 3191 that introduces a new rule, for nothing in it requires us to review matters of discretion that the marine court has considered.

Again, the order before us was made after judgment, and section 3191 does not authorize an appeal to the court from such an order (*Lawrence agt. Farley*, 73 *N. Y.*, 189; *Bamberg agt. Stern*, 76 *N. Y.*, 555).

The last observation is *obiter*, as is the further one, that the case of *Townsend agt. Hendricks* (40 *How. Pr.*, 143) would, in my opinion, warrant us in sustaining the appealability of the order, if it were not a discretionary order. I do not discuss the matter, though I have examined it and formed a decided conclusion upon it.

The appeal should be dismissed, with costs.

VAN BRUNT, J., concurred.

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## • SUPREME COURT.

FREDERICK R. FARWELL *et al.*, respondents, agt. WILLIAM E. FURNISS, appellant.

*Attachment—When the threat of a debtor that he will make a preferential assignment, furnishes no ground for the issue of an attachment.*

Where the grounds of the allowance of an attachment was that the defendant was disposing of, or was about to assign and dispose of his property with intent to defraud his creditors, and those grounds were sought to be supported by threats alleged to have been made by defendant, that if sued he would make a preferential assignment of his property, in which case those prosecuting him would get nothing on their claims. In connection with such threats his insolvency was stated with an offer to the plaintiff to compromise at fifteen per cent.

*Held*, that the attachment was improperly granted. The facts stated are insufficient to charge a debtor with an intent to defraud his creditors (*The case of Anthony agt. Stype*, 19 *Hun*, 268, *explained*).

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Farwell *et al.* agt. Furniss.

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*Third Department, General Term, May, 1884.*

*Before* LEARNED, *P. J.*, BOCKES *and* BOARDMAN, *JJ.*

*Louis Hasbrouck*, for appellant, argued that the facts stated were not sufficient to charge a debtor with an intent to defraud his creditors, and cited *Evans* agt. *Warner* (21 *Hun*, 574); *Horton* agt. *Fancher* (14 *Hun*, 172-175); *Wilson* agt. *Britton* (6 *Abb.*, 97, 98); *Dickenson* agt. *Benham* (10 *Abb.*, 390; 12 *Abb.*, 158); *Scott* agt. *Dexter* (1 *Weekly Digest*, 25); *Tallcott* agt. *Rosenthal* (22 *Hun*, 573); *Teni* agt. *Smith* (13 *Abb. N. C.*, 31-34); *Nichols* agt. *Pinner* (18 *N. Y.*, 295).

*Levi H. Brown*, for respondents, cited *Anthony* agt. *Stype* (19 *Hun*, 265); *Roules* agt. *Hoare* (61 *Barb.*, 266-271); *Gashier* agt. *Apple* (14 *Abb.*, 64-69); *Berry* agt. *Riley* (2 *Barb.*, 307); *Hyslop* agt. *Clark* (14 *Johns.*, 458); *Austin* agt. *Bull* (20 *Johns.*, 441); *Seaving* agt. *Brinkerhoff* (5 *Johns. C.*, 329); *Grover* agt. *Wakeman* (11 *Wend.*, 189); *Spaulding* agt. *Strange* (38 *N. Y.*, 12); *Haydock* agt. *Coope* (53 *N. Y.*, 68).

BOCKES, *J.*—We are of the opinion that the warrant of attachment in this case was improperly granted. The grounds of its allowance was that the defendant was disposing of, or was about to assign and dispose of his property with intent to defraud his creditors. These grounds are sought to be supported by threats alleged to have been made by him that if sued he would make a preferential assignment of his property, in which case those prosecuting him would get nothing on their claims. In connection with such threats, his insolvency was stated with an offer to the plaintiff to compromise at fifteen per cent. Such statement, offer and threats constitute the facts, and substantially all the facts, on which the writ was allowed.

Those facts have been repeatedly held insufficient to charge a debtor with an intent to defraud his creditors. The case of *Evans* agt. *Warner* (21 *Hun*, 574) is substantially like the

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Farwell *et al.* agt. Furniss.

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present. It was there laid down that such statements were intrinsically innocent, that the making of a preferential assignment by an insolvent debtor was lawful, hence not a threat to make a fraudulent disposition of his property. The court says: "The statement was simply as to the natural and probable consequence of a legitimate act put forward to induce the creditor to accept a compromise." The same doctrine has been declared in many other cases, and in some of them by an elaborate discussion of the subject (*Horton agt. Fancher*, 14 *Hun*, 172; *Wilson agt. Britton*, 6 *Abb.*, 97; *Dickinson agt. Benham*, 10 *Abb.*, 390; *Same Case on Appeal*, 12 *Abb.*, 158; *Scott agt. Dexter*, 1 *W. Dig.*, 25; *Talcott agt. Rosenthal*, 22 *Hun*, 573; *Tim agt. Smith*, 13 *Abb.*, 81).

There are no cases of a recent date, if indeed there be any at all, holding a different rule. The case of *Anthony agt. Stype* (19 *Hun*, 268), very much relied on by the respondents is entirely consistent with those above cited. In that case there were other facts stated besides the threats which tended to show a fraudulent design.

There are, it is true, some cases containing expression not perhaps in entire harmony with those above cited, but in so far as anything in them is asserted indicating a different rule, they must be held now to be borne down by a great preponderance of authority.

The order appealed from must be reversed, with ten dollars costs and expenses for printing; and the motion to vacate and set aside the attachment must be granted, with ten dollars costs of motion.

LEARNED, P. J., and BOARDMAN, J., concur.

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Fisher agt. The Charter Oak Life Insurance Company.

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N. Y. SUPERIOR COURT.

JOHN M. FISHER agt. THE CHARTER OAK LIFE INSURANCE  
COMPANY.

*Complaint — Demurrer will be sustained if the plaintiff, under the facts stated, is not entitled to the specific relief demanded, although such facts would have entitled him to other relief — When demurrer will not be sustained on the ground that the court has not jurisdiction of the person of the defendant or of the subject of the action, unless the defects appear on the face of the complaint — Complaint must state facts, not simply conclusions — Code of Civil Procedure, section 263, subdivision 7 ; section 266.*

In an action on contract, brought in the New York Superior Court, by a resident of the city against a foreign corporation, where it does not appear on the face of the complaint that the contract was not made, executed or delivered within this state, nor that the summons was not served on an officer of the defendant within this city as prescribed by law, a demurrer will not be sustained on the ground that the court has not jurisdiction of the person of the defendant or of the subject of the action.

A demurrer interposed to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action should be sustained, if the facts stated in the complaint do not entitle the plaintiff to the relief specifically demanded therein, even though they would have entitled him to some other or different relief had he demanded it.

A complaint must state facts, from which conclusions are to be drawn, not simply conclusions.

*Special Term, March, 1884.*

DEMURRER by defendant to the complaint on the following grounds :

*First.* That the court has not jurisdiction of the person of the defendant.

*Second.* That the court has not jurisdiction of the subject of the action.

*Third.* That the amended complaint does not state facts sufficient to constitute a cause of action.

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*Charles B. Alexander*, for defendant.

*William Settle*, for plaintiff.

INGRAHAM, *J.* — As to the first and second grounds of the demurrer, it is sufficient to say that the defects do not appear upon the face of the complaint.

By subdivision 7 of section 263 of the Code, a superior city court has jurisdiction where an action is brought by a resident of that city against a foreign corporation "to recover damages for breach of a contract or a sum payable by the terms of a contract, where the contract was made, executed or delivered within this state," or "where the summons is served by delivery of a copy thereof within that city to an officer of the corporation, as prescribed by law."

By section 266 it is provided that the jurisdiction of a superior city court, in an action or special proceeding, must always be presumed, and where the defendants appear in the action, the want of jurisdiction is waived by appearance, unless it is pleaded in defense.

This is an action on contract. It does not appear on the face of the complaint that the contract was not made, executed or delivered within this State, nor that the summons was not served on an officer of the defendant within this city as prescribed by law, and it therefore does not appear on the face of the complaint that this court has not jurisdiction of the person of the defendant, or of the subject of the action.

As to the third ground of demurrer: This action must, I think, be deemed an action at law for the recovery of a specific sum of money. The only relief demanded in the complaint is a money judgment against the defendant. No other or different relief is asked for, and if plaintiff is not entitled, on the facts alleged in the complaint, to judgment for a specific sum of money against the defendant, the demurrer must be sustained (*Edson agt. Gervais*, 29 Hun, 454).

The agreement on which the action is brought provided

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that whereas a portion of the assets of the company (defendant) are of uncertain value and cannot be made available as a part of the reserve of the company, and it has become necessary to reduce the liabilities of said company, the plaintiff agrees to reduce the amount of the policy payable to him two-fifths, viz.: From \$2,000 to \$1,200; and the defendant agrees that whenever said company shall realize from said uncertain assets any divisible surplus, which may properly be divided among the holders of policies so reduced, and said company will, from time to time, apportion to said policy its fair and equitable proportion of said divisible surplus by addition to said policy or otherwise, which dividend shall continue upon such reduced policies after they become due and are settled, as well as upon those which remain in force.

This is an express obligation of the defendant on the realizations from the "uncertain" assets of a divisible surplus which may properly be divided among the holders of policies so reduced. When a divisible surplus shall have been realized the company is bound to apportion to said policy its fair and equitable proportion, no discretion is vested in the company. It is not provided that the company may apportion, but it agrees it will apportion, that agreement is founded on a valid consideration and is one which the court can and should enforce.

Cases cited by defendant that where a board of commissioners are vested by statute with a discretion to apportion, such discretion will not be controlled by the court, do not apply to a case where one of the parties to the contract agree to apportion. In one case the statute expressly vests such discretion in third parties, in the other the party to the contract agrees to do a particular act.

The complaint alleges that since the execution and delivery of the said agreement defendant has realized from the uncertain assets referred to in said agreement a divisible surplus, which under the terms of the said agreement may properly be divided among the holders of reduced policies to such an

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amount that the defendant may and can now properly and legally apportion to said policy issued to this plaintiff, and reduced by the terms of the said agreement, the full amount of the difference between the amount paid to this plaintiff thereon as aforesaid and the original amount of said policy, to wit, the sum of \$800, and may and can properly and legally pay that amount to this plaintiff as promised by said agreement.

Are these allegations sufficient to give the plaintiff a right to a money judgment for \$800, or any other sum? It will be noticed that the agreement is not to pay the policyholder any sum he is entitled to on any divisible surplus being realized from the uncertain assets, but to have apportioned to said policy its fair and equitable proportion of such divisible surplus. He is entitled to his fair and equitable proportion; and before that can be ascertained it must appear what its fair and equitable proportion would be, and the defendant must then be required to apportion such a sum to the plaintiff. The word apportion means to "divide and assign in just proportion," "to distribute among two or more a just part or share to each;" and this is what the defendant has agreed to do, and such proportion must be ascertained before a judgment can be given against the defendant for a sum of money.

The case of *Boardman agt. The Lake Shore and Michigan Southern Railway Company* (84 N. Y., 157), is instructive on this point.

That was an action brought to compel the defendant, a foreign corporation, to pay dividends on certain preferred stock. By the certificate of stock it was provided that "said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually, etc., and the payment of dividends as aforesaid is hereby guaranteed."

In affirming a judgment in favor of the plaintiff requiring the defendants to pay dividends to him, and restraining defendants from paying dividends on its common stock until the claim of plaintiff was paid and satisfied," the court says,

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at page 180: "While, as a general rule, courts of equity will not exercise visitorial powers over corporations, and its officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will not interfere with the proper exercise of their discretion, yet, where the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be answered by a suit of law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power, and should be upheld. \* \* \*

The judgment here requires a specific performance of the contract, and such relief could not be obtained by an action to recover the dividend."

The relief here would be for a specific performance of the agreement, viz.: To ascertain the divisible surplus and apportion it among the holders of reduced policies, but such relief is not asked for in this action, and as the defendant did not answer but demurred, plaintiffs are not entitled to such equitable relief (*Edson agt. Gervais*, 29 *Hun*, 425).

There is another objection to the complaint, which I think is well taken.

The complaint does not state facts; the allegations are simply conclusions. "That a divisible surplus has been realized which may properly be divided among the holders of reduced policies to such an amount that said defendant may and can properly and legally apportion to said policy held by this plaintiff the full amount of the difference between the amount paid and the full amount," are simply conclusions. The Code requires that the facts should be stated from which the conclusions are to be drawn.

The demurrer must therefore be sustained, and judgment ordered for defendant on the demurrer, with costs, with leave to plaintiff to amend within twenty days on payment of costs.

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Lichtenberg agt. Herdtfelder *et al.*

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SUPREME COURT.

CHARLES LICHTENBERG, appellant, agt. ELIZABETH HERDTFELDER *et al.*, respondents.

*Execution against property must be issued before creditor's action can be maintained — Code of Civil Procedure, sections 1871, 1871.*

An execution against property must be issued before a creditor's suit can be maintained, and the fact that the debtor himself may be deceased forms no legal excuse for the omission to issue the execution.

*First Department, General Term, May, 1884.*

*Before DAVIS, P. J., DANIELS and HAIGHT, JJ.*

APPEAL from a judgment of the special term dismissing the plaintiff's complaint.

*F. R. Condert*, for appellant.

*Isaac Kugelman*, for respondent.

DANIELS, J. — The action was brought by the plaintiff to set aside as fraudulent conveyances of real estate made and executed by George Herdtfelder and wife to Jacob Heinlen, and afterwards conveyed by Heinlen to Elizabeth Herdtfelder, the defendant. Before it was commenced George Herdtfelder and wife executed and delivered a mortgage to the plaintiff upon land situated in Westchester county to secure the bond of George Herdtfelder for the payment of \$4,000. The bond and mortgage were executed on or about the 29th of November, 1876; and the debt not being paid during the lifetime of the debtor, but maturing afterwards, an action for the foreclosure of the mortgage was brought against his executors. Judgment was recovered in that action for the foreclosure of the mortgage, the sale of the mortgaged property and the recovery of the deficiency against the executors. A sale was made of the real estate included in the

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mortgage, but it failed to produce the amount found to be due by the judgment, and a judgment for a deficiency, amounting to the sum of \$3,126.96, with interest, was entered and docketed against the executors about the 1st of August, 1877. The executors, as a matter of fact, had no personal or real property of the testator in their hands, or subject to their disposition, out of which this deficiency could be collected, and the plaintiff thereupon brought this action to set aside these conveyances made of his real estate by the testator in his lifetime, and by the grantee in those conveyances to the testator's wife, alleging them to have been made with the intent to hinder, delay and defraud his creditors. No execution was issued upon this judgment, and because of that omission the complaint of the plaintiff was dismissed at the trial.

Under section 1871 of the Code, which is similar in its effect to the preceding provisions contained in the Revised Statutes upon the same matter, an execution is required to be returned unsatisfied in whole or in part to enable the judgment creditor to maintain an action to compel the discovery of anything in action or other property belonging to the judgment debtor. These provisions are unqualified and without exception when that may be the nature of the action. The creditor, however, is not obliged to resort to the remedy prescribed by this section of the Code. He may, notwithstanding its enactment, bring an action under the general equitable authority of the court in aid of his execution to remove such unlawful dispositions of the debtor's property as may render the execution while they exist ineffectual. But to maintain such an action it has been held repeatedly that the issuing of an execution against the property of the judgment debtor is first indispensably necessary. If the action is brought under the authority of the statute execution must not only be issued but it must be returned in whole or in part unsatisfied. While if the action is to remove illegal obstructions caused by fraudulent incumbrances or disposition of the debtor's

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property out of the way of the execution, it must at least be issued before an action is commenced. This point has been frequently examined by the courts and it has been sustained with but very few exceptions not now entitled to reliance as authority (*McCartney* agt. *Bostwick*, 32 *N. Y.*, 53; *Adsit* agt. *Sandford*, 23 *Hun*, 49; *Schmitz* agt. *Langhaar*, 83 *N. Y.*, 503; *Adsit* agt. *Butler*, 87 *N. Y.*, 585). And the fact that the debtor himself may be deceased forms no legal excuse for the omission to issue the execution. His executors or administrator in that case stand in his place and represent him (*Glaucus* agt. *Fogel*, 88 *N. Y.*, 434). And by section 1371 of the Code of Civil Procedure, when the judgment has been recovered, as it was in this instance, against the executors, an execution against them to be collected from real or personal property in their hands has been authorized (*See, also, Roger Car Wheel Co.* agt. *Fiedling*, and *Bowe* agt. *Arnold*, decided by this general term in January, 1884). And that it must be issued before the creditors' suit can be maintained, although the debtor himself may be deceased, was held in *Estes* agt. *Wilcox* (67 *N. Y.*, 264); and *Allyn* agt. *Thurston* (53 *id.*, 622) seems to have been to the same effect. *Loomis* agt. *Tift* (16 *Barb.*, 541) is an authority supporting the plaintiff's right to maintain the action, but as an authority for that purpose it stands alone and is directly in conflict with the others which have been mentioned and must, therefore, be considered to have been overruled. By the principle so uniformly maintained in them an execution against property must be issued before a creditor's suit can be maintained. *Miller* agt. *Miller* (7 *Hun*, 208), and *Dunleary* agt. *Tallmadge* (32 *N. Y.*, 457), are also to the same effect.

The judgment in which the appeal has been taken was accordingly right and it should be affirmed.

HAIGHT, J., concurred in the opinion of DANIELS, J.

DAVIS, P. J. (*dissenting*).—It is a maxim of the law and of equity that it will not demand a vain thing. The facts of this

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Stern agt. Moss.

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case show that the issuing and return of an execution would be an absolutely useless and idle ceremony. I think, therefore, the court should not have dismissed the complaint, and feel constrained to dissent from the conclusions of my brother DANIELS.

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### N. Y. COMMON PLEAS.

MAX D. STERN agt. PHILIP H. MOSS.

*Arrests in district courts — Action on contract — When plaintiff entitled to execution against the person.*

Where, in an action in a district court upon contract, an order of arrest has been granted upon facts (shown by affidavits) extrinsic to the cause of action, and such order of arrest has not been vacated, the plaintiff need only prove on the trial his money demand, and is then entitled to a judgment subjecting the defendant to execution against his person.

*General Term, July, 1884.*

*Before* LARREMORE, P. J., J. F. DALY and VAN HOESEN, JJ.

THE summons and order of arrest in this action was served upon the defendant, and on August 3, 1883, the parties appeared in court and issue was joined between them.

The pleadings were oral. Complaint, for goods sold and delivered; answer, general denial. A motion was made to vacate the order of arrest which had been granted upon extrinsic facts set forth in affidavits showing that the goods had been obtained upon false and fraudulent representations. Counter affidavits were made in opposition thereto.

On August 4, 1883, the motion to vacate the order was denied, and the trial of the action was adjourned to August 8, 1883, when it was tried before justice ANGEL (sitting in place of justice McGOWN), who, on August 15, 1883, rendered judgment for the defendant, dismissing the action, with costs.

Upon the trial the plaintiff only proved the sale and

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Stern agt. Moss.

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delivery of the goods in question and non-payment therefor. The defendant offered no proof, but moved to vacate the order of arrest for want of proof to sustain it. The plaintiff insisted that upon the evidence, as it stood, he was entitled to a money judgment for the value of the goods, together with the direction therein of the words, "defendant liable to execution against his person."

From the refusal of the justice to insert such direction, and from the judgment rendered, this appeal is taken.

*Louis H. Mayer*, for plaintiff, appellant.

*A. Cantor*, for defendant, respondent.

PER CURIAM. — The justice, in a well considered opinion, refers to *Coles* agt. *Hannigan* (8 *Daly*, 43) as authority for his decision. In that case the action was commenced by a warrant of arrest in the first instance, pursuant to subdivision 3, section 16, chapter 346 of the Laws of 1857. The process used determined the character of the action, and as the fraud was not denied, nor any motion made to vacate the arrest, it was held the defendant was liable to arrest upon execution, upon proof only of his indebtedness. But section 10 of the act of 1857, allowing the commencement of an action by a summons, warrant or attachment, was repealed by section 3209 of the Code of Civil Procedure, which provides that an action brought in the district courts must be commenced by voluntary appearance of the parties or by the service of a summons.

By section 3210 of the Code, article 3, chapter 19, is made applicable to the district courts. This article includes sections 2894 to 2904, subject to the qualifications mentioned in section 3211. This latter section provides that existing statutes in relation to the district courts which are not repealed shall still be applicable as to the manner of applying for, granting and executing an order of arrest, &c.

As an action in these courts must now be commenced by a

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summons, it would appear that an order of arrest therein is to be regarded as a provisional remedy somewhat analogous to the practice under section 179 of the old Code of Procedure, where the action on contract might be prosecuted irrespective of the right to arrest upon extrinsic facts.

Sections 549 and 550 have no application to arrests in the district courts of the city of New York, and subdivision 4 of section 549 is the only statute that requires that fraud in contracting the debt shall be proved upon the trial, if the plaintiff suing to recover money due upon a contract seeks the arrest of the defendant. Before the enactment of subdivision 4 of section 549, it was never necessary that the plaintiff should allege in his complaint and prove at the trial that the debt that he sued to recover was fraudulently contracted. His cause of action was an ordinary money demand, and the fraud used by the defendant in incurring the debt was a circumstance extrinsic to the cause of action to be proved by affidavit, if the plaintiff attempted to arrest the defendant. Upon his arrest the defendant was at liberty to move upon affidavits to vacate the order of arrest, and the question of the defendant's liability to arrest was always decided upon affidavits where the ground of arrest was extrinsic to the cause of action. Though the subdivision we have mentioned has introduced a new rule in courts of record, the practice in the district courts has not, as we have said, been affected by it. Section 1304 of the consolidation act prescribes the case in which an arrest may be had in an action in the district court. When arrested the defendant may move upon affidavits to vacate the order of arrest. The very point was decided in *Johnson agt. Florence* (32 *How. Pr.*, 230). Where the original process was a warrant, the setting aside of the warrant put an end to the action. But the order of arrest obtained under 1304 of the consolidation act is merely a provisional remedy, which may be vacated without affecting the summons or the right of the plaintiff to proceed with the action, in order that he may recover judgment for his demand.

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Hall agt. Edmunds.

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Where the order of arrest is sustained, the plaintiff is entitled to an entry in the judgment, if he recover one; that the defendant is subject to arrest and imprisonment thereon (*Sec. 1386 of the Consolidation Act; Coles agt. Hannigan, 8 Daly, 43*). The execution is then to be issued in accordance with the provisions of section 1399.

The judgment appealed from and the order vacating the order of arrest should, therefore, be reversed, and a new trial ordered, with costs to the appellant to abide the event.

In order to prevent misconception, we will say that section 3018 is not now before us, but we do not think it has any bearing upon the question that we have passed upon on this appeal.

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### SUPREME COURT.

CORDELIA HALL, as administratrix, agt. WILLIAM E. EDMUNDS,  
as administrator.

*Costs and disbursements against executors and administrators on reference of claim — Code of Procedure, section 817.*

The prevailing party, upon a reference of a claim against a decedent, under the unrepealed provisions of the Revised Statutes, is entitled to recover the fees of referee, witnesses and his other disbursements.

By Laws of 1877 (p. 469), all of the Code of Procedure is repealed, except certain specified sections, among which are sections 311 to 322, both inclusive, and the repealing act of 1880 (*Laws of 1880, p. 375, sub. 8*) provides, that the repeal by that act shall not affect the right of the prevailing party to recover the fees of referee, witnesses and his other disbursements, upon the reference of a claim against a decedent, under the unrepealed provisions of the Revised Statutes (*This is adverse to Daggett agt. Mead, 11 Abb. N. C., 116; see, also, Miller agt. Miller, ante, 185*).

*Monroe Special Term, July, 1884.*

MOTION by plaintiff to confirm report of referee upon a claim against an estate referred under the Revised Statutes, and for judgment thereon with disbursements.

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Hall agt. Edmunds.

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*J. E. Durand*, for motion.

*W. E. Edmunds*, opposed.

ANGLE, *J.*— The counsel opposing the motion in objecting to the allowance of disbursements relies upon *Daggett* agt. *Mead* (11 *Abb. N. C.*, 116), in which the judge appears to have rejected these items in a brief oral opinion. In the argument of that case the counsel (as the report shows), stated, “that part of section 317 of the Code of Procedure allowing disbursements, whenever there is a recovery, was repealed by chapter 417, Laws 1877.” In this the counsel was mistaken, and if the decision went upon that position an erroneous factor entered into the conclusion of the judge. Instead of section 317 having been repealed it is expressly excepted from the repeal. See Laws 1877 (*p.* 469), where all of the Code of Procedure is repealed except certain specified sections among which are “sections 311 to 322 both inclusive,” and the repealing act of 1880 (*Laws* 1880, *p.* 375, *sub.* 8) provides that the repeal by that act shall not affect the right of the prevailing party to recover the fees of referee, witnesses and his other disbursements upon the reference of a claim against a decedent under the unrepealed provisions of the Revised Statutes.

My conclusion is adverse to *Daggett* agt. *Mead*, and I allow plaintiff to recover such disbursements.

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Westerfield agt. Radde *et al.*

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N. Y. COMMON PLEAS.

JOHN H. WESTERFIELD agt. WILLIAM RADDE *et al*

*Trustees of corporation — When jointly and severally liable for the debts of the company for failure to make annual report.*

An annual report of a corporation, signed by two trustees, when the certificate of incorporation of the company was signed by seven and acknowledged by nine trustees, does not satisfy the provisions of the statute which requires such report, to absolve the trustees from personal liability for the debts of the corporation, to be signed by a majority of the trustees, where it is not shown by an official record that more than one of the trustees had resigned.

*General Term, June, 1884.*

*Before LARREMORE, P. J., DALY and VAN HOESSEN, JJ.*

*John A. Foster, for appellant.*

*John P. Reed, Jr., for respondents.*

LARREMORE, J. — When this case was first heard upon appeal, this court held, upon the evidence then submitted (7 *Daly*, 326), that the existence of a by-law of the company forbidding its officers from incurring any debt unless duly authorized by its board of trustees, raised a presumption in favor of the non-liability of the company, that the testimony offered to offset such presumption, viz., a well recognized general course of dealing in the purchase of goods, should have been left to the jury, and that the direction of a verdict for the plaintiffs was error.

Upon the second trial the jury passed upon this question, and I think the evidence offered, although not entirely satisfactory, is sufficient to sustain the finding in plaintiff's behalf.

The general term of this court, in *Third Avenue Railroad Company* agt. *Ebling* (Nov. 1882), clearly defined and distinguished the responsibility of a corporation for the act of

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Westerfield agt. Radde *et al.*

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its president of an ordinary character in its every-day business, and his acts as a merely presiding officer. The reasoning in that case appears to me to indicate that the evidence offered upon this trial as to the authority of the president to purchase goods was properly submitted to the jury.

The more serious question arises upon the fact that the annual report of January 20, 1873, required by section 12 of the act of February 17, 1848, was made by only two of the trustees, one of whom verified the same as the late acting vice-president of the company. It appears from the minutes of its board of trustees, May 4, 1872, that the resignation of S. T. Meyer, as trustee, was received and accepted. It was not shown by any official record that Bock, the president, or any other trustee, had resigned his office. The certificate of incorporation was signed by seven trustees (including the defendants), and acknowledged by nine trustees, April 10, 1872, and duly filed in the office of the secretary of state and the clerk of the city and county of New York. Section 12 of said act requires that a company incorporated thereunder shall annually, within twenty days of the first day of January make a report which shall be published, etc., which shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed \* \* \* and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made.

As before observed, there is no official record showing the resignation of either the president or secretary of the company. Nothing less than this should be allowed to defeat the provisions of a public statute intended to protect the interests of creditors who were without possible knowledge of the directorial acts of the company. The statute requires that the president or secretary shall verify the annual report, which must be signed by the president and a majority of the trustees.

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Westerfield agt. Radde *et al.*

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A refusal in either case could have been reviewed by the court and compliance with the requirements of the statute enforced. The report filed did not satisfy the provisions of the statute. Two trustees do not constitute a majority of either seven or nine. The resignations, if made, should have been shown by an official record. The loose statements of the witness Bleckwenn should not be allowed to supersede the well recognized principle that the records of a corporation are *prima facie* evidence of its official acts as well as those of its individual members. Any other theory would be subversive of justice. Three or more individuals might organize a company, incur a liability, and then by simply saying "I will resign," or by refusing to take part in any other proceedings rid themselves of a responsibility which they had voluntarily assumed. This could not have been the intention of the act in question — to leave creditors for whose benefit it was enacted to the mercy of the incorporators. They must be held to a knowledge of their liability imposed by the statute, and if overreached or injured by any act or omission of their associates must seek redress through the well known channels of the law. The resignation of the defendant Meyer was accepted before the present liability had been incurred, and he is therefore not chargeable with any neglect of duty.

After examination of all the exceptions presented upon this appeal, I have reached the conclusion that the main question of fact in this case was decided by the jury, and that the judgment should be affirmed.

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Gibbes agt. The New York Life Insurance and Trust Company.

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SUPREME COURT.

EMILY O. GIBBES agt. THE NEW YORK LIFE INSURANCE AND TRUST COMPANY, &c., and others.

*Voluntary deed of trust — When set aside — Effect of absence of power of revocation.*

The plaintiff sued to set aside a deed of trust to her brother-in-law of property which came to her through her mother's will. The day succeeding the mother's funeral her will was opened and accompanying it was found a letter, written ten years before, requesting plaintiff to put her share of the property in trust, and a form of deed was inclosed. The plaintiff then consented to sign the deed, which was executed a few days after, whereby she made an irrevocable settlement of her property, reserving the power of appointment, by last will and testament, in favor of those related to her by consanguinity, and in default of such appointment the trustee was to convey the estate to her children or descendants, and in case she should leave no child or descendant, the estate was to go by force of the deed to her heirs-at-law and next of kin. The plaintiff at the time of executing the instrument was in feeble health, and did not know the amount or condition of her property, and testified that she did not understand that she was making an irrevocable disposition of it. The trustee, under whose eye and with whose active co-operation the settlement was made and executed, and whose family was benefited by its terms and limitations, asked her and her sister "if they did not wish to follow the wishes of their parents, who were dead:"

*Held*, that plaintiff should be relieved from the settlement, and the deed of trust should be set aside.

*Special Term, July, 1883.*

*John E. Parsons and J. Hamden Dougherty, for plaintiff.*

*George De Forest Lord, for defendants.*

VAN VORST, J.—After a careful consideration of the evidence in this case, and of all the facts and circumstances disclosed upon the trial, I am of the opinion that the plaintiff should be relieved from the settlement she made in the year

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1871, and the deed of trust should be set aside. No inflexible rule can be formulated as to what state of facts would in all cases justify a court in setting aside, upon the application of the settler, a voluntary settlement. Each case must needs stand, and be determined by itself, according to what is just and right. Adjudicated cases, of which there are a large number, bear upon the general subject and should be followed where in substance the same facts and circumstances occur; but it rarely happens that two cases are alike, or that any one "has a brother." The judgment and conscience of the court, under the rules of equity and the decisions, must in the end dispose of each case by itself.

The plaintiff testifies that she did not understand the transaction, which she now asks the court to set aside, as it in the end expressed itself. She never intended to denude herself absolutely of the control of the property covered by the trust deed, and that had she understood the character of the deed, and that it was irrevocable, she would not have executed it; that its character, in this regard and otherwise, was not explained to or known by her. She wishes herself to control her property, and to make such present and future disposition of it as she chooses. Such desire is natural, and is not unreasonable on the part of this plaintiff, who is of mature years, apparently well disciplined, and who is not now wholly inexperienced in the management of property, of which she owns and controls a not inconsiderable sum. She claims to have been unduly hastened to the execution of the trust deed and to tie up her property, the amount or situation of which she did not know, and by an instrument the true character and object of which she did not at the time comprehend. I think that the evidence sustains the claim and makes out a case for relief in a court of equity. A glance at the situation and some of the facts and circumstances, I feel quite sure, will reconcile this conclusion with what is in itself just and proper, and will be found to be in harmony with what has been generally adjudicated in such cases.

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The mother of the plaintiff died on christmas day, 1870. The property in question came to the plaintiff through an unqualified and unfettered bequest contained in her mother's will. The consent to the execution of a deed of trust by the plaintiff, as is claimed by and on the behalf of the brother-in-law of the plaintiff, and who was the trustee named in the instrument, was obtained the day succeeding the funeral of the mother, when the will was opened, and the forms of deeds of trust were first handed to her. The deed was executed by the plaintiff within a few days thereafter.

Accompanying the will was found a letter signed by the mother of the plaintiff, requesting the plaintiff to put her share of the property in trust, and a form of a deed was inclosed. With regard to both this letter and the form of a deed of trust, it is to be observed that they were prepared ten years before. What might have seemed proper to be advised by the plaintiff's mother ten years before, would not be so necessarily ten years later, when the legatee had gained knowledge, experience and fixedness of character, which time and opportunity afford. It is scarcely necessary to say that neither the letter nor deed of trust formed any part of and could not modify or change the testamentary disposition, which was absolute. A trust cannot in that way be created on a will. In fact, the plaintiff's mother was prohibited by her father's will, under which she held the property for her children in such proportion as she might appoint, from impressing a trust upon it. What she gave she was bound to give in absolute terms, as she did. Yet I am persuaded that the letter of her mother, and the manner in which it was presented, and the attendant circumstances, had their effect upon the mind of the plaintiff, and fettered her will.

No time seems to have been lost in hastening the conclusion. Counsel was present, who had been invited by the brother-in law, as he says, to be present at the opening of the will, and to give needed advice. And in one interview, the day after the funeral, the trust deed first presented and

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changed on the instant in a very important particular, at the suggestion of the counsel and according to his idea, is claimed to have been understood and assented to by the plaintiff, and her signature to an engrossed copy, so soon as it could be prepared, with the alterations included — which had not been read by her — was obtained.

The occasion for presenting and consummating this transaction was, in a true sense, inopportune, in so far as the plaintiff was concerned. The plaintiff had been in attendance upon her sick mother for some time before her death, and had sat up with her night after night, ministering to her wants, and was in grief at her recent death, and was in no condition of body or mind to give a proper consideration to a subject of that importance, or at that moment to give a clear and satisfactory assent to placing the property, the amount of which she did not know, under the obligations of an irrevocable settlement. The deed cannot be said to have been her voluntary free act. It was no suggestion of the plaintiff. By this arrangement the plaintiff has never been allowed the satisfaction of enjoying the full possession, for any length of time, of the property which came to her in pursuance of an appointment made under the provisions of her grandfather's will, for upon the instant that she was advised of the gift she gave up its possession and control. The haste with which this settlement was reached was neither considerate nor wise, in the condition in which the plaintiff then stood to her mother's death.

In all transactions of this character, to have the approval of a court of equity, time and opportunity for reflection and calm decision, should have been afforded. There was not the least occasion for haste or precipitate action. With regard to placing a portion of the share derived and bequeathed to the plaintiff, and designed for her brother, in trust, the circumstances concerning which had been explained to the plaintiff by her father long before, there was no occasion for delay. But in respect to her own property the matter was an entire surprise,

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and before an opportunity to recover from the surprise had been given, the deed was executed. And the plaintiff has in substance testified that she supposed that in order to make an effective trust for her brother, the instrument she signed with respect to her own property was necessary.

It is not important to analyze the settlement itself. It is sufficient to state that by its terms there has been reserved to the settler only the power of appointment, by last will and testament, in favor of those related to her by consanguinity, and, in default of such appointment, the trustee is to convey the estate to her children or descendants; and to this there was added by the counsel, on the occasion above mentioned, according to his notion, that in case plaintiff should leave no child or descendant, the estate was to go by force of the deed to her heirs-at-law and next of kin.

The power to appoint is, therefore, limited to the circle of consanguinity. No provision can be made for a husband, in the event that plaintiff should marry. No gift can be made to satisfy the suggestion of friendship or gratitude to persons outside of those related by blood to the settler of the trust, and no impulse of charitable or benevolent inclination can be obeyed.

I have alluded above to the adjudicated cases in a general way. To uphold a voluntary settlement of this character, made without consideration, it must appear clearly that the settler understood the nature and effect of the transaction, and that she was not unduly influenced and had sufficient "*locus penitentiæ*."

I am satisfied from the evidence that she did not clearly understand that she was making an irrevocable disposition of her property. She, as well as her sister in feeble health, was influenced by the letter of their mother and by the suggestions and action of their brother-in-law, who, with his family, had a direct interest in the execution of the deed, and who chiefly supervised or directed the matter, and who asked them "if they did not wish to follow

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the wishes of their parents, who were dead." The rapidity with which the business was hastened to completion, from the opening of the will, gave no adequate time for reflection in the condition in which the plaintiff and her sister were at the time. One of the sisters has testified: "We were not given sufficient time to think it over; my health was very bad at that time; when I came down to the library, I hardly knew what was said to me or what I said; I took no interest in it at all."

Nor do I think that the plaintiff had, in any true sense, as was proper that she should have had, independent counsel. By this no reflection is intended to be made upon the learned and honorable gentleman who was present and made the changes in or additions to the deed, and who directed the preparation of the engrossed copy for signature. He was summoned to be present at the opening of the will. He knew nothing, nor did the plaintiff, of the trust deed until the will was opened. And yet he may have supposed that the plaintiff knew that a deed of that character would be found with the will. He never saw the plaintiff upon the subject but on this one occasion. His recollection of what occurred is not entirely clear, but it does not appear that he explained to her the irrevocable nature of the transaction. That should have been done to justify the court in upholding this instrument.

In the English cases the effect of the absence of a power of revocation in voluntary settlements has been much discussed, some of the judges attaching more significance and importance to such omission than others.

In *Toker* agt. *Toker* (3 *De G., J. & S.*, 487) the lord chief justice said "that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstance of such case."

In this state the simple absence from the deed of a power of revocation would not be regarded as of so serious moment, as its insertion might defeat the object of the settlement.

In *Henry* agt. *Armstrong* (44 *L. T.*, 913 [1881]), KAY, J., held that the absence of a power of revocation was no ground

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for setting aside the deed under the circumstance of that case. The settlement there was made by a man in favor of his wife and children, and the court held that a power of revocation would have been inconsistent with the object of the deed.

But the difficulty in this case is that the settler did not understand the nature and effect of the settlement, nor was it explained to her. Such explanation is necessary in all cases, especially when the settlement is by a young woman, inexperienced in business affairs (*Upon the general subject, see Perry on Trusts, vol. 1, sec. 104, pp. 96-100; Everett agt. Everett, L. R., 10 Eq., 405; Wollasten agt. Tribe, L. R., 9 Eq., 44; Coutts agt. Acworth, 8 Eq., 558; Prideaux agt. Lonsdale, 1 De G., J. & S., 433; Hall agt. Hall, 14 Eq., 365; reversed on the facts, 8 Chy. Ap., 430; Montford agt. Keene, 19 W. R., 708; Phillips agt. Mullings, L. R., 7 Ch. Ap., 244; Frederick's Appeal, 75 Pa. St., 269; Conkling agt. Davis, N. Y. Special Term, May, 1878, VAN BRUNT, J.*).

In this case I think that the plaintiff should be reinstated in the full and exclusive dominion of her property, subject to be disposed of by her as she may judge best, and if in the end those intended to be benefited ultimately by the terms of the settlement should receive the same by the free gift of the plaintiff, it will be all the more appreciated. But, if not, they can have no just reason to complain, as the right to dispose of property as the owner may determine is an incident to its ownership. The tie of blood, however, never fails to assert its claims, and is rarely overlooked when one comes to make a last will and testament.

The result is that the deed of settlement must be set aside and canceled.

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Frist *et al.* agt. Climm.

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## N. Y. CITY COURT.

SIMON FRIST *et al.* agt. ALEXANDER CLIMM.

*Answer — When party need not verify — Code of Civil Procedure, sections 523, 529 — Construction of these sections.*

Where a party would be privileged from testifying as a witness concerning the matters alleged, he need not verify his answer. He is privileged where the answer will have a tendency to accuse him of a crime or misdemeanor, or to expose him to a penalty or forfeiture.

Conveying property in fraud of creditors furnishes an exceptional case by force of section 529.

*Special Term, July, 1884.*

APPLICATION to compel the plaintiff's attorney to accept the defendant's unverified answer.

*Henry Wehle*, for motion.

*Otto Howitz*, opposed.

McADAM, C. J. — The complaint, which is verified, after alleging a sale and delivery of certain goods to the defendant, avers that the defendant was guilty of fraud in contracting the liability, and then sets out in detail specific misrepresentations to induce the credit given, and these are stated as the acts of fraud complained of. The defendant served an unverified answer, claiming that under section 523 of the Code the verification may be omitted wherever the party "would be privileged from testifying as a witness concerning the matters alleged."

The rule is that a witness is not required to give any answer which will have a tendency to accuse him of any crime or misdemeanor, or to expose him to any penalty or forfeiture; nor when, by answering, a link may be added to the chain of testimony tending to such a result (*Code, sec. 887; 2 Phillips' Ev., Cowen H. & E.'s notes, 929; Henry agt. Salina Bank,*

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1 *N. Y.*, 83; *S. C.*, 3 *Den.*, 593; 1 *How. App. Cas.*, 173; *Wheeler* agt. *Dixon*, 14 *How. Pr.*, 151).

The allegations of the complaint in effect charged the defendant with obtaining goods under false pretenses, and bring the case directly within the rule stated. Where any part of the pleading is of such a character the verification may be properly omitted (3 *How. Pr.*, 314; 1 *C. R.*, 69; 5 *Abb. Pr.*, 144; 6 *id.*, 148; 14 *Abb. Pr.* [*N. S.*], 77; 1 *N. Y.*, 83; *Constitution*, art. 1, sec. 6; 12 *How. Pr.*, 319; 2 *Hilt*, 247; 24 *How. Pr.*, 369; 24 *N. Y.*, 74).

Section 529 of the Code, relied upon by the plaintiff, is taken from 2 Revised Statutes, 174, and Laws 1883 (*chap.* 14, *sec.* 1), and does not apply. That section provides that "a defendant is not excused from verifying his answer to a complaint charging him with having confessed or suffered a judgment, or executed a conveyance, assignment or other instrument, or transferred or delivered money or personal property, with intent to hinder, delay or defraud creditors; or with being a party or privy to such a transaction by another person with like intent towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another."

It is not claimed that any but the latter portion of this section applies to this case, the preceding portion referring merely to confessed judgments, fraudulent conveyances and the like.

The words "or any fraud whatever, affecting a right or the property of another," which are claimed by the plaintiff to be applicable, probably mean, "affecting the property of another, or some right therein susceptible of injury by the fraud." If these words mean anything more, it is difficult to imagine a case of fraud to which section 529 does not apply, and impossible to find one to which section 523 can be made applicable.

Every action is founded on the evasion of some right, but this circumstance alone does not necessarily bring the case within the purview of section 529, which is aimed solely at fraudulent transfers and the like, in reference to which the

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defendant is not excused from answering under oath the charges of fraud made against him in the bill of complaint.

But in other actions in which the defendant is charged with crimes or misdemeanors, he may avail himself of section 523 and serve his answer unverified. Effect cannot be given to both sections except by holding that section 523 contains the general rule in regard to such verifications, and that section 529 contains the exceptional one, applicable only to the cases therein enumerated. How far a witness may be obliged to testify in respect to the exceptional matters need not be considered, as that is not made the test. In all other cases it is.

In the present instance the plaintiffs parted with all their property in the goods at the time of the sale. The action is to recover the contract price. Fraud is alledged as the inducing cause of the sale for the purpose of obtaining judgment in a form in which the defendant may be made liable to arrest.

But this does not make the action one affecting "a right of another" within the meaning of that term, as used in section 529. It follows that the defendant had the right to serve an unverified answer, and that the motion to compel the plaintiffs to accept it must be granted.

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SURROGATE'S COURT.

In the Matter of proving the last Will and Testament of  
THOMAS F. CARHART, deceased.

*Citation — Service of — How served — Excluding first and including last day.*

Where a citation was served on the twelfth and was returnable on the twentieth day of the same month:

*Held*, that the service was sufficient to give the court jurisdiction of the persons cited.

*Westchester county, May, 1884.*

THE citation in this matter was served on the twelfth and was returnable on the twentieth day of the same month, on

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which last day the will was proven and admitted to probate. The question has since arisen as to whether the surrogate obtained jurisdiction of the persons so cited, it being suggested that the citation was not served at least eight days before the return day thereof, and that therefore a new proceeding should be instituted with a view to proper probate.

*C. & A. Van Santvoord*, for proponent.

COFFIN, S.—I am entirely satisfied that the service was sufficient, and that this court obtained jurisdiction of the persons cited. The general rule as to the computation of time in the service of papers is that one day is included and one excluded. This rule is stated by MARCY, J., in *Small agt. Edrick* (5 *Wend.*, 137). Such a rule would render the service in this matter perfectly proper. Doubtless the legislature, and also the supreme court, then had power to vary the general rule. In the case cited the legislature had required the notice of trial to be served at least fourteen days before the first day of the court, but made no provision for the computation of time; and the service on the ninth for the twenty-third of November would have been good under the general rule, and would have been so held in that case had not a rule of the court expressly excluded the first day. Now, however, the various codes provide that the last day shall be included. Here section 2520 of the present Code requires the citation to be served at least eight days before the return day. Section 788 of the same Code provides that the time within which an act is required by law to be done must be computed by excluding the first and including the last day. This section is made applicable to surrogates' courts by subdivision 6 of section 3347. Therefore, whether the citation in this matter was served in time depends upon the construction to be given to section 788. Section 368 of the Code of 1848 (*sec. 407 of that of 1858*) is substantially the same as above section 788. It was also provided by section 211 (256 of 1858) that either

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party might give notice of trial at least ten (amended to fourteen in 1859) days before the court. These sections were construed by the supreme court in the cases of *Easton* agt. *Chamberlain* (3 *How. Pr. R.*, 412), *Dayton* agt. *McIntyre* (5 *ib.*, 117) and others, all of them holding that the first day of the court must be included in computing the time.

Section 977 of the present Code of Civil Procedure provides that notice of trial shall be served "at least fourteen days before the commencement of the term." There is no substantial difference, therefore, between the former and the present codes in this respect, and the universal practice is, as I am informed by intelligent lawyers in active practice, to include the first day of the court or term in the computation. The above decisions apply with equal force to the present Code. It will be difficult to discover any reason why this rule of computation shall not apply as well to the service of a citation, which must be "at least eight days before the return day thereof" as to a notice of trial, which must be served "at least fourteen days before the court," or "before the commencement of the term." I must, therefore, dissent from the *dictum* on this subject in the case of *Boerum* agt. *Betts* (1 *Dem. R.*, 471), and hold that the service in this case was sufficient.

I have deemed it proper to examine the question with some care, as titles of devisees are involved.

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The People *ex rel.* Ithaca Savings Bank agt. Beers *et al.*

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## SUPREME COURT.

THE PEOPLE *ex rel.* ITHACA SAVINGS BANK agt. SAMUEL BEERS *et al.*, assessors of the town of Ithaca.

*Taxes and assessments — Savings banks — How and in what manner to be taxed — When uninvested cash not liable to assessment and taxation.*

In a proceeding to test the validity of an assessment levied upon a savings bank, it appeared by the oath of its treasurer that on July 1, 1883, its surplus was \$48,252.04, and that the whole of its surplus was invested in government bonds. It had the sum of \$97,750 invested in such bonds. On July 1, 1883, the bank had on deposit in the First National Bank of Ithaca the sum of \$46,978.19. The money so deposited was shown to have formed a part of the assets of the bank, but no part of its surplus. It was also shown that the bank had no other personal property liable to taxation. No United States bonds were purchased by the bank from January 1, 1883, to July first of that year. During that time the bank's surplus had increased about \$1,750, and during all this time the bank had United States bonds to an amount largely in excess of its surplus:

*Held, first*, that as the statute under which the bank was incorporated did not authorize it to hold property consisting of money, goods or other property to be employed by it in conducting the business of the corporation, and which could not be withdrawn or divided among its members, it cannot be held that the bank had any capital, or that the money it had in the First National Bank uninvested was taxable under the provisions of the Revised Statutes.

Prior to the statute of 1857 (*Laws of 1857, chap. 456, sec. 4*) the money deposited in savings banks was taxable as the personal property of the depositors, but since that statute a *savings bank* cannot be taxed on such deposits.

When a repealing statute is itself repealed, the first statute is revived. When the legislature in 1882 repealed the statute of 1875, which repealed the act of 1867, the statute of 1867 was revived and came into full operation again.

Under the statute of 1867, if the surplus of the savings bank was not invested in United States securities, the assessors had authority to assess the bank for its privileges and franchises as personal property, to the extent of its surplus not so invested. But this bank had the whole of such surplus invested in such securities, and therefore had nothing which was liable to taxation under the statute.

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Before it can be held that there is a surplus in the hands of a savings bank, which is liable to assessment and taxation under the statute of 1867, there must be deducted from the total assets of such bank, first, the amount of all the just debts owing by it, and second, the amount of its assets which are actually invested in United States securities, and the remainder, after making both of these deductions, is the only surplus which is the subject of assessment and taxation.

*Cortland Special Term, October, 1883.*

*Mynderse Van Cleet*, for relator.

*P. G. Ellsworth*, for respondent.

MARTIN, J.— The relator is a savings bank duly incorporated by the laws of this state (*Chap. 176, Laws 1863; chap. 94, Laws 1864, and chap. 141, Laws 1868*). The respondents are the assessors of the town of Ithaca, N. Y. In the year 1883 the respondents assessed the relator for “cash in bank uninvested, \$15,000.” On the 21st day of August, 1883, in pursuance of the notice given by the assessors, the relator appeared before them, objected to such assessment on the ground that it was unjust, illegal, and without jurisdiction, and asked to have said assessment stricken from the assessment roll. The treasurer of the relator then made oath before the assessors that on the first day of July, 1883, the total assets of the relator were \$558,368.37; that its total liabilities were \$510,116.33; that its surplus on that day was \$48,252.04, and that the whole of such surplus was invested in United States government bonds. It had the sum of \$97,750 invested in such bonds. On July 1, 1883, the relator had on deposit in the First National Bank of Ithaca the sum of \$46,978.19. The money so deposited was, by the affidavit of its treasurer, shown to have formed a part of the assets of the relator, but no part of its surplus. It was also shown, by the oath of its treasurer, that the relator had no other personal property liable to taxation. No United States government bonds were purchased by the relator from January 1, 1883, to July first of

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that year. It appeared from the affidavit of said treasurer that during that time the relator's surplus had increased about \$1,750. The relator was shown to have had during all of this time United States government bonds to an amount largely in excess of its surplus. The respondents refused to strike such assessment from the roll. The correctness of this assessment is challenged by the relator, and that question is brought before this court upon the return of the respondents to a writ of *certiorari*, issued out of this court under and in pursuance of the provisions of chapter 269 of the Laws of 1880.

The question here presented then is, had the respondents the right to assess the relator upon its cash in bank which was uninvested. Was such uninvested cash liable to assessment and taxation. It will hardly be contended, I apprehend, that this money in the hands of the relator, or rather under its control, was liable to assessment and taxation unless it was so made liable by some special or general law. The respondents contend that it was liable to taxation under and by virtue of the general provisions of the Revised Statutes. The provisions of the Revised Statutes, so far as they are claimed to be applicable to this question, are as follows:

"All lands, and all personal estate, within this state, whether owned by individuals or by corporations, shall be held liable to taxation, subject to the exemptions hereinafter specified" (*R. S. [7th ed.], 981, sec. 1*).

"The term personal estate, whenever it occurs in this chapter, shall be construed to include all moneys, debts due from solvent debtors, whether on account, contract, note, bond or mortgage" (*R. S. [7th ed.], 982, sec. 3*).

The defendant is clearly a corporation, and the cash deposited in the First National Bank was clearly within the above definition of personal estate. Therefore, unless the property under consideration is subject to some of the exemptions referred to in the above statute, there would seem to have been in this statute sufficient authority for the respondents to make the assessment complained of.

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But the following exemption is created by the same statute: "The following property shall be exempt from taxation, \* \* \* the personal estate of every incorporated company not made liable to taxation on its capital in the fourth title of this act" (*R. S. [7th ed.], 982, sec. 4*). Title 4 of said act provides that "all moneyed or stock corporations deriving income or profits from their capital, or otherwise, shall be liable to taxation *on their capital* in the manner hereinafter prescribed" (*R. S. [7th ed.], 1036, sec. 1*).

The foregoing exemption is a general one and applies to every incorporated company which is not made liable to taxation *on its capital* by the fourth title of the statute above quoted. Hence, if an incorporated company has no capital, it would, under the foregoing statutes, be exempt from taxation upon its personal estate. The statutes under which the relator was incorporated nowhere give it the right to issue any stock, or to hold any capital as such. The general law gives it no such right. The theory of the law under which savings banks are incorporated is, that such banks are to possess no capital. They are simply to receive deposits, and to invest the same so that the depositors (who are supposed to be persons of limited means, and who generally deposit but small amounts), shall receive an income from the money so deposited. It is the duty of such a bank to so regulate the rate of interest to be allowed depositors, that they shall receive, as nearly as may be, a ratable proportion of all the profits of such corporation, after deducting expenses. Before a corporation can be said to have a capital, within the meaning of this statute, it must be authorized to hold property, consisting of money, goods or other property to be employed by it in conducting the business of the corporation, and which cannot be withdrawn or divided among its members. No such authority existed here.

I do not think that it can be held that the relator had any capital, or that the money it had in the First National Bank, uninvested, was taxable under the provisions of the Revised

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Statutes (*The Mut. Ins. Co., of Buffalo* agt. *The Board of Supervisors*, 4 N. Y., 442; *The Sun Mut. Ins. Co.*, agt. *The Mayor of New York*, 8 Barb., 450; S. C., 8 N. Y., 241; *People ex rel. Ins. Co.*, agt. *Supervisors of New York*, 20 Barb., 681; S. C., 16 N. Y., 424).

Assuming the correctness of the foregoing conclusion, and the question arises whether the money deposited in these banks can in any way be reached for the purpose of taxation. Prior to the statute of 1857 the money thus deposited was doubtless taxable as the personal property of the depositors.

The legislature, however, in that year passed an act providing that "the deposits in any savings bank which were due depositors \* \* \* shall not be liable to taxation, other than the real estate and stock which may be owned by such bank or company, and which are now liable to taxation under the laws of the state" (*Laws 1857, chap. 456, sec. 4*).

Under this act a question has arisen as to whether such depositors can still be taxed upon their deposits. Upon that question there seems to be a conflict of opinion. The attorney general of the state in 1869 was of the opinion that such depositors were still liable to taxation, while others have held the contrary doctrine. But all have, I think, concurred in holding that since that statute a *savings bank* could not be taxed on such deposits. That is all that is necessary to hold in this case.

While such was the law of this state the legislature passed an act providing that the franchises and privileges of savings banks should be deemed personal property for the purpose of taxation, and that they should be liable to taxation to the extent of their surplus (*Laws 1866, chap. 761, sec. 7*). In 1867 this provision of the statute was amended so as to read as follows: "The privileges and franchises granted by the legislature of this state to savings banks or institutions for savings are hereby declared to be personal property, and liable to taxation as such in a town or ward where they are located, to an amount not exceeding the gross sum of their surplus earned

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(after deducting the amount of such surplus invested in United States securities), and the officers of such banks or institutions may be examined on oath by assessors as to the amount of such surplus and securities, and the property of such banks and institutions shall be liable to seizure and sale for the payment of all such taxes assessed upon them for said privileges and franchises" (*Laws 1867, chap. 861, sec. 1*).

By the passage of this act the legislature seemed to recognize the fact that there was then no law by which the property of a savings bank could be made liable to taxation. By property I mean the surplus in the hands of such bank beyond the sum due its depositors. The legislature deemed it proper that such surplus should be liable to taxation, and hence the law of 1866, amended in 1867. Under this law a savings bank was liable to taxation for its privileges and franchises, which were declared to be personal property to the amount of its surplus, unless such surplus was invested in United States securities. Before the amendment of 1867 the relator would have been liable under the statute of 1866 to assessment and taxation on its privileges and franchises, notwithstanding the fact that its surplus was invested in United States securities (*Monroe Savings Bank agt. City of Rochester, 37 N. Y., 365*).

By the amendment of 1867, the surplus which was thus invested, was to be deducted from the amount of such surplus, and the remainder only was the subject of assessment and taxation. It follows, I think, that if the whole of such surplus was so invested, then the privileges and franchises were exempt from taxation.

But in 1875 the legislature passed a general act to conform the charters of all savings banks and institutions for savings to a uniformity of power, rights and liabilities, and to provide for the organization of savings banks, for their supervision, and for the administration of their affairs, and by section 56 of that act expressly repealed the foregoing statutes of 1866 and 1867.

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The People *ex rel.* Ithaca Savings Bank agt. Beers *et al.*

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The statute of 1875 made no provisions whatever in relation to the liability of savings banks to taxation, and consequently by the repeal of the statutes of 1866 and 1867, the state was again left without any statute relating to this subject.

The law so remained until 1882, when the act of 1875 was repealed. Thus the act which repealed the statute of 1867 was itself repealed. This presents the question as to the effect of the repeal of the statute of 1875. It seems to be well settled that when a repealing statute is itself repealed, the first statute is revived (*Wheeler agt. Roberts*, 7 Cow., 356; *People agt. Davis*, 61 Barb., 457; *Churchill agt. Marsh*, 2 Abb., 225; *Vanderberg agt. Village of Greenbush*, 66 N. Y., 1; *People agt. Supervisors*, 67 N. Y., 17).

Under these authorities it must, I think, be held that when the legislature in 1882 repealed the statute of 1875, which repealed the act of 1867, that the statute of 1867 was revived and came into full operation again. Therefore, the question in this case must be decided under the statute of 1867. If the surplus of the relator was not invested in United States securities, the respondents had authority under that statute to assess the relator for its privileges and franchises as personal property to the extent of its surplus not so invested.

But, by the affidavit produced by the relator, it appeared that the whole of such surplus was on July 1, 1883, actually invested in such securities. If this be true, then the relator had nothing which was liable to taxation under that statute, and the motive which induced such investment can in no way affect the result. If it were to be conceded that this surplus was so invested to prevent taxation, still the law remains the same and the relator would be entitled to its exemption (*People ex rel. agt. Ryan*, 88 N. Y., 142).

It is, however, contended by the respondents that as it appeared by the affidavit furnished by the relator that its surplus increased about \$1,750 from January to July, 1883, and that no United States bonds or securities were purchased

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during that time, therefore so much at least of its surplus was subject to taxation.

I do not think that this contention of the respondents can be sustained. I am of the opinion that before it can be held that there is a surplus in the hands of a savings bank which is liable to assessment and taxation under the statute of 1867, there must be deducted from the total assets of such bank, first, the amount of all the just debts owing by it (*R. S. [7th ed.], 991, sec. 9*); and second, the amount of its assets which are actually invested in United States securities (*People ex rel. agt. King et al., MSS., Sp. Term, 2d Dist., BARNARD, J.; The People agt. Commissioners of Taxes and Assessments, 41 How., 459*); and that the remainder, after making both of these deductions, is the only surplus which is the subject of assessment and taxation.

If I have correctly determined the rule to be applied in making assessments under that statute, then it follows that the respondents had no authority to make the assessment complained of, and it should be stricken from the assessment-roll (*Matter of Savings Bank, 20 Hun, 481*).

Application to strike the relator's assessment from the roll granted, without costs to either party.

Relator's attorney will prepare the proper order in accordance with the foregoing opinion, and send to me for certification.

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### N. Y. COMMON PLEAS.

CHESTER S. COLE, as captain of the port of New York, agt.  
MICHAEL MAHONEY.

*Harbor-masters — their power as to removal of vessels — when person liable for penalty for disobedience of order of harbor-master.*

The act of 1862 (*chap. 487*) in regard to the harbor-masters is general in its character, and is not limited to cases where other vessels require to be immediately accommodated in receiving or discharging cargoes.

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Cole agt. Mahoney.

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They have power to act summarily, and their duty in this respect may be considered a necessary police regulation. The statute contemplates prompt and decisive action.

*General Term, May, 1884.*

*Before LARREMORE, P. J., J. F. DALY and VAN HOESSEN, JJ.*

APPEAL from an order of the general term of the city court affirming a judgment entered upon a verdict at trial term.

On May 8, 1882, the canal boat Emma was lying at a certain bulkhead in the port of New York, in charge of the defendant Mahoney. On that day one of the harbor-masters of said port ordered Mahoney to remove the boat from the place at which she was stationed. He refused and neglected to obey said order. The plaintiff then brought this action, setting up in his complaint the facts above stated; that the defendant thereby became liable to him in the sum of fifty dollars, according to the provisions of the laws of the state of New York in such case made and provided. The defendant, by his answer, admitted that the boat was in his charge at the time and place above stated, and that he was then discharging his cargo therefrom by authority of one of the harbor-masters of said port.

Issue was joined upon the pleadings and a trial had, which resulted in a verdict in favor of the plaintiff, from which appeal is taken.

*Hyland & Zabriskie, for appellant.*

*Goodrich Deady & Platt, for respondent.*

LARREMORE, J.—At the commencement of the trial the defendant moved to dismiss the complaint “as not stating facts sufficient to constitute a cause of action,” and upon the further ground that the statute under which it was brought was not properly pleaded. The motion was denied and the defendant excepted. In this there was no error, for the court was bound to take judicial notice of chapter 487 of the Laws of 1862.

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The judge submitted the question of fact to the jury whether or not the plaintiff showed or exhibited to the defendant a copy of the law above referred to, as required by the fifteenth section thereof, and to the charge upon such submission no exception was taken.

The main contention at the trial and upon this appeal relates to the construction to be given to section seven of the act above mentioned. Section seven provides that "each harbor-master shall have power within the district assigned to him, to provide and assign suitable accommodations for all ships and vessels and regulate them in the stations they are to occupy at the wharves or in the stream, and to remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be immediately accommodated for the purpose of receiving or discharging their cargoes, and shall have power to determine as to the fact of their being fairly and in good faith employed in receiving or discharging their cargoes, and shall have the authority to determine how far and in what instance it is the duty of the master and others having charge of ships and vessels to accommodate each other in their respective situations, and if any master or any person having charge of any vessel, canal boat, barge or lighter, shall refuse or neglect to remove his vessel, canal boat, barge or lighter when ordered to do so by the captain of the port, or by the harbor-master, or shall resist or forcibly oppose said officers in the discharge of their duties, such master or person so refusing, neglecting, resisting or opposing, shall for every such offense, forfeit and pay the sum of fifty dollars, to be recovered with costs of suit by and in the name of the captain of the port, before any court having cognizance thereof.

It was held by this court, in *Adams agt. Farmer* (1 E. D. Smith, 588), under an act similiar to the one in question, that the power given by the statute to harbor-masters is general in character and not limited to cases where other vessels require to be immediately accommodated in receiving or dis-

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charging cargoes. That a harbor-master should have power to act summarily is evident from the language of the statute. His duty in this respect may be considered a necessary police regulation. If in any or every case the validity of his action should first be tried and determined by a jury, the very object of the statute might be defeated on account of the delay incident to such litigation. The statute contemplates prompt and decisive action, in the cases for which it provides, by the officer intrusted with the performance of its duties. If he shall exceed or abuse his authority he is amenable to the law like any other public officer. The statute gives him jurisdiction and requires him to decide upon the very facts which the appellant contends should have been submitted to the jury (*Cole agt. Kelly*, 1 *City Ct. R.*, 400).

I have not overlooked the case of *Hoeft agt. Seaman* (38 *Superior Ct. Rep.*, 62). The special term of that court sustained an injunction *pendente lite* upon the ground that it did not appear that there was any impending necessity or application for the immediate use of the pier where the floating bath was located by written permission of the department of docks. Assuming, as the court held, that harbor-masters are officers of limited jurisdiction, and can only exercise such powers as are expressly given, yet in the case at bar the statute expressly says that such officers may remove vessels not employed, &c., and make room for others, and shall have power to determine the fact of good faith as to receiving and discharging cargoes. There was no evidence of the exercise of any arbitrary power, but only that which the statute expressly conferred.

The repeal of the act of 1862 cannot affect the rights vested by a prior judgment without a saving clause to that effect (*Church agt. Rhodes*, 6 *How.*, 281 ; *Harting agt. The People*, 22 *N. Y.*, 95). The case last cited points out the distinction of the effect of an *ex post facto* law between a criminal proceeding upon a writ of error and a review upon an appeal of an action under the Code. In the latter case it was held that

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the judgment reviewed was controlled by the law as it stood when such judgment was pronounced.

The other objections in the case do not appear to have been well taken, and the judgment should be affirmed, with costs.

J. F. DALY and VAN HOESSEN, JJ., concur.

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### SUPREME COURT.

PRATT MANUFACTURING COMPANY, respondent, agt. JORDAN  
IRON AND CHEMICAL COMPANY.

*Answer, what to contain — when answer may be stricken out as frivolous — Code  
of Civil Procedure, section 500.*

In an action by one domestic corporation against another domestic corporation the answer was as follows: "The defendant answering the complaint of the plaintiff, upon information and belief, alleges: First, that it admits that both plaintiff and defendant are domestic corporations; second, it denies each and every allegation in said complaint contained:" *Held*, that the answer was frivolous. It did not deny that it did not have knowledge or information sufficient to form a belief of either of the allegations contained in the complaint. Neither did it in direct terms deny either of such allegations. It was so substantially defective as to create no issue in the case.

*First Department, General Term, June, 1884.*

*Before DAVIS, P. J., BRADY and DANIELS, JJ.*

APPEAL from a judgment and order at special term in favor of plaintiff upon the defendant's answer as frivolous. The plaintiff, a domestic corporation, sued the defendant, also a domestic corporation, for goods sold and delivered.

*Chas. H. Knox*, for respondent.

*James B. Dill*, for appellant.

DANIELS, J. — The answer of the defendant which was stricken out was in the following form:

"The defendant, answering the complaint of the plaintiff,

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upon information and belief alleges: First, that it admits that both plaintiff and defendant are domestic corporations ; second, it denies each and every allegation in said complaint contained. Therefore the defendant demands judgment that the complaint be dismissed with costs." It was neither made nor framed in the manner prescribed by section 500 of the Code of Civil Procedure. When it is designed to deny any portion of the complaint in an action, that section has directed that it shall be done by "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief." Neither of these directions was observed in drawing the defendant's answer, but it was stated that the defendant answered upon information and belief. It did not deny that it did not have knowledge or information sufficient to form a belief of either of the allegations contained in the complaint. Neither did it in direct terms deny either of such allegations. It might very well have had the requisite knowledge or information to form a belief that all the allegations contained in the complaint were true consistently with the answer as it was served in the action. The mode of answering prescribed by the Code is clear and simple, and it was intended that it should be substantially followed, and if not so followed the allegations of the complaint would be left uncontroverted, and required by section 527 of the Code of Civil Procedure to be consequently taken as true. This construction was followed upon a similar pleading in *Lloyd agt. Burns* (38 N. Y., *Superior Ct. Rep.*, 423) when this mode of answering was condemned as ineffectual for the purposes of the action, and that was affirmed in 62 *New York*, 651. Neither of the cases cited in support of this appeal lend any countenance to this form of answer. They all proceeded upon facts so variant from it as to be inapplicable. It is not necessary to examine the further objection, whether the verification was formally correct or not. For as the answer was so substantially defective as to create no issue in the case, the court was right in striking it out, and

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as no merits had been sworn to, no leave to serve a further answer to the complaint can be directed. If that is to be obtained it must be upon other papers warranting the order.

The judgment and order should be affirmed, with the usual costs and disbursements, but without prejudice to a motion on the merits for leave to serve an answer.

DAVIS, P. J., and BRADY, J., concur.

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### N. Y. COMMON PLEAS.

CHARLES F. MATTLAGE agt. THE NEW YORK ELEVATED  
RAILWAY COMPANY and THE MANHATTAN RAILWAY  
COMPANY.

*Elevated railroads — No right to place stair-cases or build stations in or over intersecting streets — When owner of building entitled to injunction to prevent the maintenance of such depot.*

Chapter 478 of the Laws of 1867, which authorized the defendants to construct an elevated railroad along both sides of Greenwich street, and on Ninth avenue, or on *streets* west of Ninth avenue, does not empower defendants to place stair-cases or to build stations in or over the streets that intersect the line of the railroad.

*Held*, that the depot in question in Warren street was erected and is now maintained without the authority of law and is a purpresture.

*Held*, further, that the plaintiff falls within that class of sufferers whose injuries are such as to give them individually a right to demand the protection of the court, and his right to an injunction is clear.

The plaintiff by maintaining a wooden awning over the sidewalk does not deprive himself of his right to complain of an unlawful structure that darkens his windows and renders his store unfit for the transaction of his ordinary business.

Nor is the plaintiff guilty of such laches as to disentitle him to an injunction.

*Special Term, July, 1884.*

VAN HOESSEN, J.— The plaintiff asks that the defendants be enjoined from maintaining a depot that shall extend down

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Warren street, beyond the westerly line or side of Greenwich street. If that relief should be denied to him, the plaintiff then asks that he receive compensation for such injuries as the continuance of the depot in its present condition has caused and will hereafter cause him.

The plaintiff is the owner of the house and lot situate on the south-westerly corner of Greenwich and Warren streets, and he conducts upon the premises the business of a dealer in provisions. He bought the property in 1878, and he has occupied it ever since. I think that he owns to the middle line of Warren street, but in his complaint he alleges that "the mayor, aldermen and commonalty of the city of New York acquired their interest therein (*i. e.*, in Warren street), and have ever since held the same, in trust, nevertheless, that the same should be appropriated and kept open for the purposes of a public street forever, and that the legislature has never granted to the defendants any right to use or occupy said street, or any part thereof, for any purpose, or burden the said street with any public use in favor of said defendants."

Although there be no allegation that the fee of the street is in the city of New York, it was assumed upon the trial, at least by the counsel for the defendants, that the complaint, fairly construed, amounted to an admission that the city owned the fee of the street, and that the plaintiff had only such an easement therein as was appurtenant to his rights as an abutting owner. Upon the argument, the counsel for the plaintiff contended that his client was the owner of the street, and the counsel for the defendants then said that he was surprised by that claim, as the evidence had been taken by both parties upon the assumption that the city, and not the plaintiff, had the title to the street. As I understood the counsel for the plaintiff at an early stage of the trial, when a question was raised as to whether or not the fee of the street was in the plaintiff, he said he considered the matter of small consequence, because whether his client owned the fee or whether he had merely an easement, he was in either case entitled to an

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injunction. If my memory be correct, there was not an unqualified concession that the fee was in the city of New York, but there was good ground for the argument of the counsel for the defendants that the allegation that the city held the street "in trust" was tantamount to an admission that the city had the legal title to the land of the street. I shall treat the case, therefore, as if the plaintiff had no other rights in Warren street than those of an abutting owner. I shall first inquire what the defendants have done; secondly, whether they had any lawful authority for their proceedings; and thirdly, what redress, if any, the plaintiff may be entitled to.

It is conceded that the defendants entered the vault under the sidewalk of the plaintiff's building, and there built two piers for the support of iron columns that stand upon the sidewalk and form part of the underpinning of the structure, which, in the complaint, is called a depot. The depot stands entirely in Warren street. The house that is used for the sale of tickets is twenty feet wide by thirty-six feet deep, and is a substantial structure of wood and iron. Its floor is on a level with the plaintiff's second story windows, and its roof is nearly as high as the roof of the plaintiff's house. The roof projects over the sides of the ticket office so as to cover Warren street from curb to curb. The carriage-way in Warren street for more than forty feet is completely roofed by the defendant's structure. As may be expected, this structure, parallel to the plaintiff's building, equal to it in height, and close to its side, intercepts the light that naturally would enter the plaintiff's windows, and darkens the interior of the house. The store, which is on the ground floor, can no longer be used for some of the purposes for which it was available before the depot was built. The grading of fish (an important part of the plaintiff's business) cannot be done because there is not now light sufficient for the work. Whilst the light has been taken from the store, the piers built in the vault have diminished the space usable for the storing and handling of goods. The greater part of the piers is within the curb-stone line, and

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within that part of the vault of which (it may be assumed as against a wrong-doer) the plaintiff was in lawful occupation.

Now, the construction of piers in his vault and the erection of a house thereon are wrongful acts, unless the defendants had lawful authority for the building of this structure in Warren street. Chapter 489 of the Laws of 1867 authorized the construction of an elevated railroad along both sides of Greenwich street, west of Ninth avenue, to the Harlem river. The road was to run along Greenwich street, at all events, but it was not determined by the legislature whether it was to run on Ninth avenue or on "*streets* west of Ninth avenue." The reason for my emphasizing the word *streets* will appear hereafter. The act authorized the appointment of three commissioners, who should have power to remove obstructions, awnings, signs and other local objects; to designate the points at which stair-cases in the streets should be erected for public access to the railway, and at which turnouts and connections between the tracks should be made.

The counsel for the defendants contends that the authority of the commissioners to designate the points in the *streets* in which stair-cases should be erected confers upon them the power to order the construction of stair-cases in any of the cross streets that the railroad intersects; but such is not, in my opinion, the meaning of the act. The word "*streets*" must refer to those streets in which the railroad was to lay its track. No other streets are mentioned. The power to use other streets is not expressly given, nor is it given by necessary implication. We have become so accustomed to find stations of the elevated railroads at the corners of streets that the mind, from the force of habit, is inclined to take it for granted that a station must needs be on a corner, but this is by no means so. Stations have been located at corners partly because those places are convenient, and partly, I suspect, because they presented an inviting field to those who wished to occupy land without paying for it. The law-making power evidently did not contemplate the use of the streets for depot

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purposes, for the act expressly provides that the railroad company may "rent, purchase or acquire such *buildings* or *parts of buildings* as may be convenient for the stations or depots for public access to the railway."

It will be seen that stations and depots are to be in buildings that the railroad company may hire or buy, though stair-cases may be erected in the streets through which the track is laid. In all probability, it never occurred to the legislature that the ticket offices of the company would be built over the highway. As a matter of fact, we know that other railways, both horse and steam, sell tickets and receive passengers, without building depots in the highway, middle of public thoroughfares. What necessity, then, can there be for placing the offices of the defendants in the highway? As far as the act of 1867 is concerned, it does not empower the defendants to place stair-cases or to build stations in or over the streets that intersect the line of the railroad.

With respect to the right of the company to excavate "spaces required for the foundation of its columns," section 6 of the act expressly provides that it shall be exercised "within the streets indicated." Those streets, as I have already said, are those through which the track is to be laid. There is no other act to which my attention has been called that enlarges the powers of the defendants with respect to its depots and columns.

The learned counsel for the defendants, without mentioning any particular section of chapter 606 of the Laws of 1875, said generally that that act in some way gave some right to the defendants to use side streets for depot purposes, but I cannot discover any provision that has the least connection with the manner of constructing the railroad in Greenwich street. The commissioners were appointed under the act of 1867, and who continued in office until after the completion of the Greenwich street road, and who may still be acting, when they gave their certificate of approval of the location of the railroad, and of the manner in which it had been built,

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say that they were acting under the act of 1867, and under the act chapter 595 of the Laws of 1875. They did not suppose that they derived any power from chapter 606 of the Laws of 1875, nor can I see how that act can be so construed as to confer any authority upon them.

Chapter 595 of the Laws of 1875, is said, however, to cover the case completely, and to remove all doubt as to the right of the defendants to maintain their depot at Warren street as it now stands. Section 4 of that act provides that "the location of the lines or routes not specifically located by law, and the position and construction of the tracks, side-tracks, turn-outs, stations and *other structures, which said company is or may be authorized by law* to construct, may be such as said company may adopt and the said commissioners approve."

It is urged that the company has adopted this station, and that the commissioners have approved it. Undoubtedly this is true; but is it true that the company was authorized by law to locate the station in its present position, and to construct it in the highway? First, let me read section 7 of the act, which declares that "this act shall not be so construed as to authorize the building or extension of said road through, *along or upon* any streets or avenues except along *Greenwich* street to *Ninth* avenue, and along *Ninth* avenue, or streets west of *Ninth* avenue, as authorized by section 4 of chapter 489 of the Laws of 1867." Is the depot a part of the railroad? If it be, then there is a positive legislative declaration that the building of it *along or upon* any street except *Greenwich* street, *Ninth* avenue, or streets west of *Ninth* avenue is without authority of law.

But this is not all. The court of appeals in the *New York Elevated Railroad Case* (70 N. Y., 327) decided that the act of 1875 conferred no new franchise upon the New York Elevated Railroad Company, but simply confirmed such franchises as were granted by the act of 1867; and that the act of 1875 would have been unconstitutional if it had given any new right to lay down tracks or any new privilege to use the

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streets for the private purposes of the company. The power of the defendants to build and maintain this depot must be found in the act of 1867, if it exist at all, and that act does not confer it. It follows, therefore, that the depot was erected, and is now maintained without the authority of law, and is a purpresture.

Now, to what redress is the plaintiff entitled? As the depot is a common nuisance, an indictment is the only remedy for its abatement, unless the plaintiff has sustained some injury, not merely greater in degree, but different in kind from that suffered by the community at large.

I think that he falls within the class of sufferers whose injuries are such as to give them individually a right to demand the protection of the court. The people at large may, whilst passing in this locality, experience a sense of annoyance at having this structure over their heads and at being impeded by the columns, but it does not appear that they are injured in purse or in person by the obstruction. The plaintiff, on the other hand, suffers a pecuniary loss through the injury to his business that the darkening of his windows occasions. He was bound to prove, and he has shown to my satisfaction, that the building of the depot has prevented him from carrying out his business as beneficially and profitably as he had previously done. The necessity that he is now under of carrying his goods out to the sidewalk in order to grade them, and the expense that the extra handling causes to him, make out a case of special damage that gives the plaintiff a right to maintain an action. If I were sitting to assess damages, I would give to the plaintiff substantial damages for the loss of light. Under these circumstances the right of the plaintiff to an injunction is clear (*Back agt. Stacy*, 2 C. & P., 466; *Aynsley agt. Glover*, 11 *Moak's Eng.*, 528). "Where substantial damages would be given at law, there a court of equity will interpose," said vice chancellor Wood in *Dent agt. Auction Mart Company*

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(*L. R.*, 2 *Eq.*, 245) and in *Aynsley* agt. *Glover* (*sup.*) the master of the rolls adopted the rule.

To the granting of an injunction the defendants raise several objections that are not founded on their alleged right to build the depot.

*First.* It is said that the plaintiff himself obscures the light by maintaining a wooden awning over the sidewalk, and that he therefore combines with the defendants in darkening the store so as to make himself a contributor to his own injury. Indeed, the counsel called it a case of contributory negligence, though I confess I cannot see how he contributed to the erection of the depot, which is the grievance which the court is asked to redress. It is proved that the awning did not darken the store so as to prevent the plaintiff from carrying on his business in any part of the premises, and the rule is that "a plaintiff, who, in an insignificant degree, obscures the light of his own dwelling house, is not disentitled to an injunction to restrain the defendant from erecting a building that will seriously diminish the light, and that nothing short of an act by the plaintiff that will produce somewhat the same amount of injury as that of which he complains will deprive him of the right to relief" (*Arcedeckne* agt. *Kelk*, 2 *Giff.*, 283). Casting aside all decisions and relying on common sense, is it not clear that by building a shelter from the sun a man does not deprive himself of his right to complain of an unlawful structure that darkens his windows? The awning was intended to exclude some of the sun's rays, even though the store might be somewhat darkened, but I do not draw from that fact the conclusion that if a man fails to make full use at all times of all the light that the sun would give him, he thereby places himself at the mercy of any one who chooses to obscure his windows (*Moore* agt. *Hall*, 28 *Moak*, 164).

*Secondly.* It is said that the light of which the plaintiff is deprived is not direct but only reflected light, and a sort of scientific inquiry was pursued to show at what angles the rays of the sun would strike the walls of the plaintiff's building.

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I attach but little importance to theories of that character when we have before us proof that enough of the sun's rays were in some way intercepted to render the plaintiff's store unfit for the transaction of his ordinary business. We have not in this country any such statute as the Metropolis Local Management Act (*chap. 102 of 25 and 26 Vict.*), and an inquiry as to the angles at which light may fall has no place in our system of administering the law (*Theed agt. Debenham*, 16 *Moak*, 712; *Hackett agt. Baiss*, 15 *Moak*, 459).

*Thirdly.* It is said that the plaintiff is by reason of his laches disentitled to an injunction. If the question here was as to the right of the plaintiff to compel the removal of the piers in his vault, I should acquiesce in the justice of the defendants' position. It was the duty of the plaintiff, when the defendants invaded his vault, to meet them at the threshold with the weapons of defense that the law had placed within his reach. The law is the same to-day that it was on the day when the vault was first encroached upon. He himself is to blame for permitting his premises to be used for the foundation of the defendant's piers. Saying nothing as to his right to damages in an action at law, I should certainly deny to him a mandatory injunction. He knew when the foundations were dug exactly the nature and extent of the encroachment upon his vault.

With respect to the station on the street, however, the plaintiff stands in a very different position. It was not upon his property. The extent to which it would darken his windows, if, indeed, it should darken them at all, was something that he could not possibly know until the structure had been completed. He had only an easement to protect, and that he was in no position to defend until it was certain to be injured. The rule in *Cooper agt. Hubbuck* (30 *Beavan*, 160), that was referred to in the *Ninth Avenue case* (3 *Abb. N. C.*, 358), is applicable only where the structure that it is sought to remove by mandatory injunction was one that obviously would necessarily injure the plaintiff if it were allowed to go on to com-

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Cavanagh agt. Morrow.

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pletion. Until this depot was completed the plaintiff had no right to assume that it would be so constructed as to darken his windows. There can be no doubt that when he discovered the effect that the structure would have upon his building the plaintiff moved with the greatest promptitude.

No facts have been presented to me that bring this case within the rule laid down in *Currier's Company* agt. *Corbett* (2 Dr. & Sm., 360), and the plaintiff should have the relief prayed for and the structure erected by the defendants in Warren street should be removed.

Judgment for the plaintiff, with costs.

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## SUPREME COURT.

JAMES CAVANAGH and others agt. GEORGE T. MORROW  
and others.

*Insolvent assignment—When a creditor is to be held to have acquiesced in the fact of an assignment by the debtor for the benefit of creditors, and the legality of such assignment, so as to be estopped from claiming that it was fraudulent in its inception.*

When a debtor, in failing circumstances, has made an assignment of his estate for the payment of his debts, his creditors may come in under the assignment and insist that the assignee shall, with fidelity, execute the trust in pursuance of the instrument. Or the creditors may stand aloof, refusing to recognize the validity of the instrument on the ground of actual fraud or other illegality, and they may institute appropriate proceedings at law or in equity to test the validity of the assignment in the courts.

Creditors have an election as to which course they will adopt. They cannot pursue both. Creditors cannot in one moment take steps in recognition of the assignment, and in the line of its strict enforcement, according to its terms, and seek to hold the assignee to its performance, and in the next repudiate it as fraudulent and void.

An election may be implied from the facts and circumstances of the case, and when an election is made it is irrevocable. Creditors may express their election to come in under an assignment in several ways: "by giving notice to the assignee of the acceptance of it," and less

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formally by simply presenting their claims to the assignee for payment or dividend. By coming in under a voluntary assignment, creditors express their election to accept of its provisions, and are considered as acquiescing in the disposition made.

The act of a creditor in verifying his claim and presenting it to an assignee is a recognition of the lawfulness of his title to the assignee's estate, and of his right to administer the same, in payment of the debts of the assignor, as provided for in the instrument. And when a creditor having verified his claim and presented it, goes further and becomes a party to a proceeding for an accounting by the assignee, under the statute, and exercises the right to scrutinize the accounts and to interpose objections to payments and disbursements made by the assignee, he should be held to have acquiesced in the fact of the assignment by the debtor for the benefit of creditors, and the legality of such assignment, so as to be estopped from claiming that it was fraudulent in its inception.

*Special Term, February, 1884.*

*Lewis & Clopton and P. Mitchell, for plaintiffs.*

*James L. Bishop and John E. Parsons, for defendants.*

VAN VORST, J.—The plaintiffs are judgment creditors of the defendant George T. Morrow, and as such bring this action to set aside as fraudulent a voluntary assignment of all his property, made by their debtor George T. Morrow to the defendant Thomas J. Morrow, for the benefit of his creditors. The assignment bears date the 25th day of May, 1880, and it contains preferences. The debtor's estate consisted chiefly of a shoe factory and its contents of manufactured and unmanufactured merchandise, although he owned other property, real and personal, which passed under the assignment.

The assignee took possession of the assigned estate, and converted the same, or a large portion thereof, into money, and applied the proceeds towards the payment of the debts provided for in the assignment. He has still on hand moneys applicable to the payment of debts of the assignor.

The plaintiffs, claiming that the assignment is fraudulent in law upon its face, and also fraudulent in fact, ask that it be

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set aside and that a receiver of the property shall be appointed, and that out of the proceeds of the property their judgments shall be paid.

It is argued on behalf of the defendants that under the evidence the plaintiffs are precluded from maintaining this action for the reason that they have confirmed the assignment, and were, at the time of the commencement of this action, seeking to enforce it in a proceeding then and now pending in the court of common pleas.

The proceeding in the court of common pleas was one instituted by the assignee for an accounting, in pursuance of the provisions of chapter 466 of the Laws of 1877, entitled "An act in relation to the assignment of the estates of debtors for the benefit of creditors," and the amendments thereto. The plaintiffs filed their claims with the assignee, and appeared in the proceeding in the court of common pleas, and interposed objections to the assignee's account. The account and the objections were by that court referred to a referee, before whom testimony was taken. The referee took and stated the account and made his report to the court, showing, amongst other things, the proceeds realized by the assignee of the assigned property, and the disposition made by him thereof in the payment of debts, and the balance of cash remaining in the hands of the assignee applicable to the debts which have not been paid. In these proceeds in the hands of the assignee, the plaintiffs are entitled as creditors to participate.

The action of the plaintiffs in thus filing their claims with the assignee and taking part in the proceedings for an accounting becomes significant when the character and object of the law of 1877 are considered. This act recognizes the right of a debtor to make an assignment of his property for the benefit of his creditors, and provides for the making of an inventory of the assigned estate and the recording of the assignment. It declares that the assignee may advertise for creditors to present to him their claims, with vouchers duly verified, on

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or before a day to be specified. The county judge, who has power over the assignee and the trust estate, is authorized, on the application of creditors, to remove an assignee for incompetency. The county judge has power to issue a citation requiring the parties to show cause why an accounting should not be had, on the petition of an assignee or of a creditor. All persons interested in the fund, except creditors who have not duly presented their claims, may appear and take part in the proceeding. The county judge, on the proceeding for an accounting, has power to examine the parties in relation to the assignment and accounting and all questions connected therewith; to require the assignee to file an account of his proceedings, and to take and state such account; to settle and adjudicate upon the account and the claims presented; to decree payment to creditors of their just proportion of the fund, and to execute such further powers in respect to the accounting as a surrogate may exercise in reference to an accounting by an executor or administrator. Every order or decree of the county judge becomes an order of the court and is the subject of appeal.

These provisions of the act above referred to, and others which might be named, show that the proceedings authorized to be taken before the county judge in respect to the accountings of assignees under voluntary assignments, are based upon the validity of an instrument executed and recorded in pursuance of its terms. The act, therefore, of a creditor in verifying his claim, and presenting it to an assignee, is a recognition of the lawfulness of his title to the assigned estate, and of his right to administer the same, in payment of the debts of the assignor, as provided for in the instrument. Unless the act of a creditor in so presenting his claim to an assignee has such significance it would be an idle ceremony. Men are not presumed to take such steps with any other than a useful and lawful purpose. And when a creditor, having verified his claim and presented it, goes further and becomes a party to a proceeding for an accounting by the assignee, under this stat-

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nte, and exercises the right to scrutinize the accounts and to interpose objections to payments and disbursements made by the assignee, he acts clearly in recognition of the validity of the assignment and of the propriety of an accounting by the assignee under the assignment.

When a debtor, in failing circumstances, has made an assignment of his estate for the payment of his debts, his creditors may come in under the assignment and insist that the assignee shall, with fidelity, execute the trust in pursuance of the terms of the instrument. Or the creditors may stand aloof, refusing to recognize the validity of the instrument, on the ground of actual fraud or other illegality, and they may institute appropriate proceedings at law or in equity to test the validity of the assignment in the courts.

Creditors have an election as to which course they will adopt. They cannot pursue both. Creditors cannot in one moment take steps in recognition of the assignment, and in the line of its strict enforcement, according to its terms, and seek to hold the assignee to its performance, and in the next repudiate it as fraudulent and void.

The principle of election rests upon the equitable grounds that "no man can be permitted to claim inconsistent rights with regard to the same subject. \* \* \* A person cannot accept and reject the same instrument, or having availed himself of part, defeat its provisions in any other part; and this applies to deeds, wills and all other instruments whatever" (*Leading Cases in Equity*, by W. & T., vol. 1, p. 541; note to *Noys agt. Mordaunt*, and *Streetfield agt. Streetfield*, and numerous cases cited).

An election may be implied from the facts and circumstances of the case, and when an election is made it is irrevocable (*Estate of James Burke*, *Parson's Select Cases*, Penn., 470).

Creditors may express their election to come in under an assignment in several ways: By giving notice to the assignees of their acceptance of it, "and less formally by simply pre-

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senting their claims to the assignees for payment or dividend" (*Burrill on Assignments*, sec. 478 [4th ed.], 1882).

By coming in under a voluntary assignment, creditors express their election to accept of its provisions, and are considered as acquiescing in the disposition made (*Idem*, secs. 475, 479, 503).

It may be conceded that it is of the essence of an election that it was made with full knowledge. But that the plaintiffs had knowledge of everything necessary to be known to make an intelligent election, and to determine their line of action, will appear below, where another view of this case is presented.

But it is urged on the behalf of the plaintiffs that they are not concluded by their action in filing their claim with the assignee and appearing in the proceeding in the court of common pleas for an accounting, and filing objections therein, for the reason that the court of common pleas overruled one of their objections and held that the examination of witnesses in the proceeding for the purpose of impeaching the validity of the claims specially preferred in the assignment, was incompetent and improper.

The objections interposed by the plaintiffs in that proceeding were as follows: 1st. That the assignee had not accounted for all the property that had come into his hands. 2d. That he had used the trust estate for the benefit of the assignor. 3. That the allowance of the claims of Cornelius Morrow and three other preferred creditors was illegal, fraudulent and for the benefit of the assignor. 4th. That the amounts paid by the assignee for legal services were illegal. 5th. That the sale of the assets of the trust estate to Cornelius Morrow was illegal, collusive and fraudulent and for the benefit of the assignor, and that the sum realized therefor was grossly inadequate to their actual value.

It will be thus seen that all of the objections made by the plaintiffs in the court of common pleas, except the third, had reference exclusively to the administration by the assignee of his trust according to the assignment. These objections,

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in their scope and application, had in view the holding of the assignee accountable for property he had not accounted for, and for payments claimed to have been made improperly and for proceeds he had not realized. These objections all challenged the action of the assignee in his management and disposition of the estate. They all looked to an increase of the funds applicable to the payment of debts, in which the plaintiffs, as creditors of the assignor, were entitled to participate, and from which they might receive a dividend. They were in support of, and not against, the assignment.

The third objection, however, in effect sought to impeach the claims of certain preferred creditors, but this not directly and in words. The objection was that the allowance of those claims was illegal, and for the benefit of the assignor. As stated and in form, the objection is that the assignee should not in his account be credited with these payments. Could the plaintiffs have succeeded in their contention under the objection made, they would have, to the extent of such payments, increased the amount to be distributed among the general creditors. But the court of common pleas properly enough excluded this objection, leaving to the plaintiffs the right to prosecute their other objections, which challenged the administration of the trust estate. They so excluded this objection, because the proceeding in that court to which the plaintiffs were parties was founded upon an administration of the trust estate according to the terms of that instrument. And that a creditor so appearing and taking part in the accounting could not attack the instrument itself. One position was inconsistent with the other.

The conclusion reached, therefore, in respect to the action of the plaintiffs in the court of common pleas, is that it was a recognition of the assignment, and of the liability of the assignee to account for the proceeds of the assigned estate according to the terms of the deed of trust. But, irrespective of their participation in the proceedings in the court of common pleas, the plaintiffs are estopped by their conduct and

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action in recognition of the validity of the assignment from now seeking to impeach it.

The plaintiffs and other creditors of the assignor became aware of the assignment immediately after it was made, and commenced at once to investigate the condition of the assigned estate and its value, and advised the assignee as to its administration. A meeting of creditors was called and a committee was appointed to examine into the condition and value of the estate, and to guard their interests in its administration. The plaintiff Cavanagh was one of that committee. The members of the committee were all business men familiar with the matters and interests to be examined. The books and papers and property were exposed by the assignee to the examination and inspection of the committee of creditors. The inventory of the assigned estate, as well as the claims against it, were examined and discussed. The property was valued by the committee, and what it would probably realize for the purposes of the assignment was ascertained by them. Creditors, including the plaintiffs, authorized the assignee, by a writing signed by them, to "go on and finish up the unfinished stock at the factory," and "to put it in a condition for sale in the market, and further, that he be empowered to buy sufficient raw material to work up into manufactured form the unfinished work and all other material on hand."

The most valuable part of the trust estate consisted of the factory, and the merchandise manufactured and unmanufactured on hand. As to what the merchandise would bring at a sale thereof, at public or private sale, was discussed. The assignee seemed disposed to adopt either course, and to sell by auction, or otherwise, so that the best price should be realized.

The plaintiff Cavanagh, although he believed the stock was worth \$47,000, offered himself to purchase it from the assignee for the sum of \$30,000. If his valuation was a correct one, this would have yielded him a large profit. Yet he was disposed to take it to himself. The only other offer made for the stock as a whole was \$25,000. Cavanagh in the

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end, however, withdrew his offer of \$30,000 and advised the assignee to sell the stock to Cornelius Morrow, a brother of the assignor, for \$27,500.

The testimony of the plaintiff Cavanagh upon this subject is not without interest, in view of the fifth objection interposed in the court of common pleas, and which has been urged against the assignment on this trial. The assignee having told him that he had advertised the property for sale, and having asked the advice of Cavanagh as to the value of the property, Cavanagh, using his own words, said: "I told him that I stood ready to give \$30,000 for it. He said that he hadn't got but one offer of \$25,000; he didn't suppose that he would get any higher offer. I then said to him, why don't you sell it to your brother Cornelius; he would give as much for it as anybody, and you seem disposed to keep the property in your family. Well, he says, I don't know that Cornelius would give \$25,000. Anyway, I says, suppose you try him. He said he would go and see what Cornelius would give." The same witness further said, when a paper was handed to him to sign, consenting to a sale to Cornelius Morrow: "Before I signed the paper I asked Mr. Morrow how we were going to get our thirty-five cents which he agreed to give us in his compromise paper. Mr. George Morrow said that that would be settled; that he proposed to pay me the thirty-five cents anyway; and when Thomas Morrow came in I asked him if he understood that to be the fact — that I was to get my thirty-five cents. He says 'yes, you will get your thirty-five cents in two weeks.' I then said to him: 'Now, I want you to understand that I am willing to pay \$30,000 for this property, but for the sake of Mr. Morrow and the family I am willing to withdraw my offer on condition that you give me that thirty-five cents.'"

This occurred during the time the committee of creditors, of which Cavanagh was one, was engaged in the examination of the property and assets.

The committee having completed their work, reported to

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the body of creditors that they had examined the books and other assets of the assignor, and that a sub-committee had made a careful examination of the stock, machinery and merchandise. That it was agreed to report the value of the merchandise and machinery at \$47,567.63. "That the books of the assignor were found in good condition, and the accounts showed the state of the business, and that no difficulty was experienced in getting at the facts and figures." The committee in their report also gave their estimated value of the other property, and stated the amount of the unsecured debts preferred in the assignment. They stated that in the event of the business being wound up by the assignee, there would be a considerable loss to the estate on preferences secured by collaterals. Afterwards the creditors, including the plaintiffs, by a writing executed by them severally, authorized and empowered the assignee to accept an offer made for the stock and machinery by Cornelius Morrow, the offer being \$27,350 for the merchandise and machinery, and \$12,000 for the factory, the same being the largest offer which, after the advertisement, had been obtained. The merchandise and machinery were then sold by the assignee to Cornelius Morrow for the sum named.

This conduct and action on the part of the plaintiffs, I apprehend, is an acquiescence in the fact of the assignment and its legality and in the right of the assignee to manage the assigned estate, and to dispose of the same for the benefit of those interested under the deed of trust, in pursuance of its terms. And this line of conduct and action was deliberately taken after full means of knowing all the facts in regard to the terms of the assignment, the extent of the claims preferred and their nature, the value of the assigned estate, and the purposes to which it was by the deed devoted.

It is no answer to the conclusion which such conduct on the part of the plaintiffs suggests that the creditors were moved with a desire to effect a compromise with their debtor. That they should desire such a compromise, and also that the

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assigned estate should realize the most for the adjustment of their claims, was reasonable. But any amount they might hope to receive out of this property was based upon the amount to be realized after payment of the debts preferred by the assignment. All the creditors did not, however, come in, and the compromise was not consummated. The plaintiffs cannot in reason complain, either that they have not had sufficient opportunity or means, before deciding upon the course they should adopt, to investigate all matters necessary to be known understandingly. If there was a fraud in the inventory of assets, the property was before them and they examined it.

The books, which they have said were well kept, were opened to them, by which the fairness of the preferred debts could be tested. The factory and its contents was open to their inspection. If the assignment was designed to accomplish fraudulent ends they should not have acknowledged it, but should have spurned it from the beginning. The fact that they treated with the assignee, acted with and advised him in the way above mentioned, is evidence that they did not regard the assignment as a fraud upon their rights.

Such conduct and action on the part of the plaintiffs I conclude to be a ratification of the assignment, and an election on their part to regard it as a transfer, legal and proper in itself.

And having taken such an attitude, a court of equity cannot do otherwise than hold them to their election. And although they may have been disappointed in what they expected to gain by the course they pursued, they cannot, in a court of equity, change their position to one of hostility, and seek to wrest from the assignee the remaining assets to be applied to the satisfaction of their judgments, upon the ground that the deed was fraudulent in its inception.

Notwithstanding the contention of the learned counsel of the plaintiffs, I do not regard the assignment as fraudulent upon its face; but entertaining the views above expressed, I do

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Macauley agt. The Bromell and Barkley Printing Company.

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not deem it important to pass upon the other questions in the case, as I conclude that for the reasons above given the plaintiffs' complaint must be dismissed, with costs.

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## N. Y. CITY COURT

MACAULEY agt. THE BROMELL AND BARKLEY PRINTING  
COMPANY.

*Answer — Denial of allegations in the complaint, how may be made.*

In an action against a corporation, an answer verified by its treasurer denying upon information and belief, each and every allegation of the complaint, except the allegation of the defendant's incorporation is in accordance with the present practice and creates a triable issue of fact, which must be disposed of by a trial in the regular way.

*Special Term, July, 1884.*

McADAM, J.—The answer, "upon information and belief, denies each and every allegation of the complaint, except the allegation of the defendant's incorporation." The plaintiff moves for judgment upon the ground that the answer is sham and frivolous. The answer is verified by the treasurer of the corporation, and cannot be stricken out as sham (45 N. Y., 281, 468). It is said to be frivolous because a corporation cannot deny an allegation "upon information and belief." The case of *Shearman agt. The New York Central Mills* (1 Abb. Pr., 187), decided under the old Code, is relied on by the plaintiff as an authority against the sufficiency of the answer. It is said in that case that "a corporation is an artificial being which from its nature can have no knowledge or belief on any subject, independent of the knowledge or belief of its agents. It is a mere legal entity; it neither knows nor thinks." Exactly so. But the officers and agents of the corporation must verify the answer and must, under the new Code, do so truthfully under the pain and penalty

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Windmuller agt. Dodge & Sinclair.

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of a possible prosecution for perjury. The case cited intended to hold a corporation to the strict form of denial required (under similar circumstances) from a natural person. It did not intend to discriminate against corporations nor to require from them any different form of plea than the Code requires from individuals. Testing that case by this rule, and applying the decisions under the new Code to the form of the answer, it must be held good (*See* 59 *How. Pr.*, 206 ; 5 *Abb. N. C.*, 88, 90 ; 6 *Hun*, 18). Under these decisions the person verifying the pleading "is permitted in a great measure to impress upon the pleading the operation of his mind," that he may make the verification conscientiously. In the light of these cases the form of denial used in the answer, though "upon information and belief," is in accordance with the present practice and creates a triable issue of fact, which must be disposed of by a trial in the regular way. It follows that the motion for judgment must be denied. No costs.

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SUPREME COURT.

LOUIS WINDMULLER and others agt. DODGE &amp; SINCLAIR.

*Assignment — When will be set aside.*

In a general assignment by a partnership a preference of an individual creditor of one partner invalidates the whole deed; at least, when alterations in the books of the firm clearly indicate a fraudulent intent.

*Special Term, May, 1884.*

THE firm of Dodge & Sinclair made a general assignment for the benefit of creditors on the 28th day of November, 1882, with liabilities of about \$150,000, and assets of about \$50,000.

An action was commenced by Louis Windmuller and others by creditors' bill, to set aside the assignment on the ground

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Windmuller agt. Dodge & Sinclair.

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that a preference of the mother of Sinclair, one of the assignors contained in the assignment, was fraudulent and nullified the whole deed.

*Francis Lutton and William H. Arnoux*, for plaintiffs.

*Richard S. Newcombe and Albert Cardozo*, for defendants.

VAN BRUNT, J. — I regret to be compelled to come to the conclusion that the assignment in this case cannot be sustained.

That Walter S. Sinclair was indebted to his mother for the amount of the preference mentioned in the assignment seems to be reasonably established; but it does not at all appear that such money was expended by him in the business in which he was engaged, or that such debt was assumed at the time of the formation of the firm of W. S. Sinclair & Co. His business debts were assumed by that firm, and as such were entered in the books of the concern, but his individual debts do not appear to have been assumed, and it seems to be reasonably certain that some of this money, loaned by his mother to him, at least, was appropriated to the payment of his individual debts.

The fact that alterations were made in the books in the manner in which they appear, indicates beyond question a fraudulent intent. It was an attempt to impose upon those who should examine the books of the firm, and to make their books appear to show transactions which were entirely different from the truth. This circumstance seems to be of so grave a character as to stamp the whole transaction with suspicion that has not by any means been removed by the testimony offered.

I have been led irresistibly to the conclusion that Walter S. Sinclair had applied a large amount of this money received from his mother to his own individual uses, and that a considerable amount of this money had been received and expended prior to the formation of the new firm, and which had never been assumed by the new firm. The books of the firm were altered for the purpose of bringing within the

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Powers agt. Hogan.

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liability of the firm such debts, in order that they might be preferred in the assignment which was then being contemplated. Such being the facts, I see no way in which the assignment can be sustained.

Judgment accordingly.

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### N. Y. COMMON PLEAS.

WALTER POWERS agt. ISABELLA V. HOGAN.

*Mechanic's lien — When recovery can be had upon a quantum meruit — When notice and demand necessary.*

In an action to foreclose a mechanic's lien, where there has been an abandonment of the contract by defendant, it is not necessary for plaintiff in order to recover upon a *quantum meruit* to show legal excuse for not fully performing the contract, nor, where the time fixed by the contract for its performance has been waived, to notify the defendant of his intention and demand performance upon his part within a reasonable time.

*General Term, June, 1884.*

*Before LARREMORE, VAN HOESEN and BEACH, JJ.*

LARREMORE, J.—This action was brought to foreclose a mechanic's lien, filed October 13, 1880, in favor of the plaintiff for \$12,810, upon certain premises in the city of New York owned by the defendant. All the issues were heard and decided by a referee appointed for that purpose, from whose rulings and decision this appeal is taken. The referee found for the plaintiff upon the facts alleged in the complaint, but decided that as it appeared that the contract in suit had not been fully performed by the plaintiff, and he had not shown a sufficient legal excuse for abandoning it, no recovery could be had upon a *quantum meruit*. That as the time fixed by the contract for its performance had been waived, the plaintiff was bound to notify the defendant of his intention,

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The People agt. Hooghkirk.

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and demand performance upon his part within reasonable time. This precise point was decided in *Lawson agt. Hogan* (93 N. Y., 39) where a contract similar in character in relation to the same premises was in dispute.

But this case presents another feature both distinctive and conclusive. The referee has found, among other reasons, that the plaintiff failed to perform on account of the refusal of the defendant to allow him to continue his work; that he continued in its performance according to directions until September 8, 1880, when he was stopped and forbidden to further complete the same by Hogan, who acted therein by the authority of the defendant.

If these facts be true, and there is evidence to support them, there was an abandonment of the contract by the defendant, and the rule in *Lawson agt. Hogan* is not applicable. Neither notice nor demand was necessary upon such a refusal of performance.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide event.

VAN HONSEN and BEACH, JJ., concurred.

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## COURT OF APPEALS.

THE PEOPLE, respondent, agt. WILLIAM A. HOOGHKIRK,  
impleaded, appellant.

*Criminal law—Trial jurors—Arson—Evidence—Code of Criminal Procedure, sections 238, 239, 399—Effect of the provisions of section 399 as to evidence of accomplices.*

The right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted no longer exists; he can raise no objection except to individual jurors under section 239 of the Code of Criminal Procedure.

On a trial for arson in the third degree, two accomplices swore that defendant was to and did purchase cheap horses to be exchanged for

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The People agt. Hooghkirk.

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more valuable ones before the fire. Several witnesses testified to selling cheap horses to defendant, and one S. swore to the exchange of horses being made. The court refused to charge that there was no evidence to corroborate the accomplices:

*Held*, no error. The rule now embodied in the statute (*sec. 599, Code Crim. Proc.*), is substantially the rule which, before the statute, courts were in the habit of stating to the jury for their guidance, but neither the doctrine hitherto declared by courts nor the rule embodied in the statute, requires that the whole case should be proved outside of the testimony of the accomplice.

Evidence of the defendant on cross-examination in such cases with reference to his connection with other fires and with insurance on other property burned, is admissible in the discretion of the court as affecting his credibility.

*June Term, 1884.*

*E. J. Meegan and Edwin Countryman*, for appellant.

*D. Cady Herrick*, district attorney, for respondents.

ANDREWS, J. — The indictment against the defendant Hooghkirk was found at the court of sessions, Albany county, at the September term, 1883, by a grand jury selected in pursuance of chapter 533, Laws of 1881. Before the jury was sworn or impaneled, the defendant, who, prior to the commencement of the term, had been committed to answer to any indictment that might be found against him thereat, filed in open court a written protest or objection, under oath, against the swearing, organization or recognition by the court of the persons summoned as grand jurors, or of any of them as a grand jury, on the ground that they were not drawn or summoned as required by law. The same facts in support of the objection were presented as in the *Petrea case* (92 N. Y., 128). The question is the same as was considered and determined in that case, except as it is affected by the consideration that in this case the objection was raised before indictment, and before the grand jury had been organized.

In the *Petrea case* it was held that upon the facts proved and offered to be proved, the act of 1881 was unconstitutional

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in so far as it provided for the selection of grand jurors for Albany county, for the reason that it was a local bill for the selection of grand jurors, and as such within the prohibition of article 3, section 18 of the state constitution, which prohibits the passage of a local bill for "selecting, etc., or impanneling grand or petit jurors." But the court further decided that a defendant might, nevertheless, be lawfully put upon his trial upon an indictment found by a grand jury selected under the act; that no constitutional right of the defendant was thereby invaded; that the right of the defendant to raise the objection was a matter of procedure, subject to the control of the legislature, and that the objection was not one which, by the new procedure in criminal cases, could be taken by a defendant after indictment. The only question now open on this appeal, upon this branch of the case, is whether, under the Code of Criminal Procedure, a defendant held to answer a criminal charge, may, on the return of the grand jury list, and before indictment, take the objection which, under the decision in the *Petrea case*, he would be precluded from taking after indictment. If the case permits this discrimination, the objection must prevail, otherwise the case is governed by our former decision. By section 238, a challenge to the panel or any of the grand jurors is prohibited, but the section authorizes the court in its discretion to discharge the panel for causes specified, and among others "that the requisite number of ballots was not drawn from the grand jury box of the county." Section 239 authorizes a challenge to be interposed to an individual grand juror for certain specified causes. Taking the two sections together, it seems to be quite evident that section 238 was intended to confer upon the court a discretionary power to discharge the panel to be exercised upon its own volition, and in view of all the circumstances, while section 239 was intended to secure to an accused person the right to purge the panel of one or more particular grand jurors who might be objectionable, for bias or other specified cause.

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The power conferred by section 238 is in the general interest of public justice; that conferred by section 239 is in the particular and special interest of the person accused. The objection interposed to the panel in this case on behalf of the defendant was in the nature of a challenge to the array, and the right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted, no longer exists, and we find no provision of law permitting a defendant to raise any objection to the grand jury, except an objection to individual jurors under section 239. We think the objection of the defendant to the grand jury was properly overruled. It may not be out of place, however, to express the opinion that the court, except for the fact that the grand jury which found the indictment in this case, although selected and organized after the decision in the *Petrea case*, was selected before the board of supervisors had an opportunity to prepare a grand jury list in conformity with the general law, might very properly, on its own motion, have discharged the panel.

It is very unseemly that grand juries should continue to be selected under the act of 1880, after that law has been declared unconstitutional, and the omission of the board of supervisors to perform the plain duty of preparing a proper grand jury list ought not to be longer tolerated.

The other questions arise upon exceptions taken on the trial. The principal one is an exception on behalf of the prisoner to the refusal of the court to charge that there was no evidence tending to corroborate the testimony of the witnesses Jones and Nugent, who concededly by their own confession were accomplices of the defendant in the commission of the crime charged in the indictment. The general facts relating to the alleged crime, as testified to by the accomplices, are that on and prior to January 2, 1883, Jones was lessee of a stable in the city of Albany, and had procured an insurance of \$500 on horses and property therein, which, at the suggestion of Hooghkirk, he increased to \$1,000, with

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the understanding that Nugent was to fire the barn, for which he was to receive \$100, and that the insurance money should be divided between Jones and Hooghkirk. It was a part of the arrangement that Hooghkirk should buy some cheap horses to be put in the stable in place of other more valuable horses to be removed before the fire. The fire occurred Tuesday, January 2, 1883, at about 12.50 A. M. Monday or Tuesday evening before the fire Hooghkirk, as Nugent testifies, brought two cheap horses to a point near the stable, and then exchanged them for two other horses belonging to Hooghkirk, which Nugent and one Strevell, by the direction of Jones, had taken from the stable, and the horses received from Hooghkirk were taken back to the stable and were burned in the fire. One or two other cheap horses were, as the accomplices testify, also purchased by Hooghkirk shortly before the fire and placed in the stable. It is not claimed that Hooghkirk either set the fire or was present when it was set. The evidence is that it was set by Nugent, who admitted the fact.

The evidence contained in the record goes into great detail, but it is unnecessary for the present purpose to refer more particularly to the evidence of the accomplices. It is sufficient to state that if their testimony is true, there can be no question of the guilt of the defendant. On the other hand, if their testimony is excluded from the case, it is not probable that he could have been convicted, although circumstances would remain calculated to excite grave suspicion. Christopher Ferns testified he sold a horse to Hooghkirk in December before the fire for fifteen dollars, and delivered it within a few days, and Hooghkirk testified that it was delivered New Years night. John Ernztart testified to the sale of a horse to Hooghkirk two or three days before New Years for fifteen dollars, and to its delivery either Sunday or Monday night before the fire. George Brown testified to a like sale a few days before New Years for ten dollars, and that the horse was delivered to Hooghkirk on Sunday or Monday night before

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the fire. John Feizenbaum testified that the defendant Hooghkirk, about January 1, 1883, in the evening, brought to his place about a mile and a-half from Albany, two bay horses, with collars and blankets, and left them with him a few days and then took them away. John Strevell testified he worked for Jones at the time of the fire; that on Monday evening, the night of the fire, he went to the stable and found Jones and Hooghkirk there; that Jones brought out two bay horses and asked him to go and help Nugent exchange them; that they went with them to Washington avenue (about a block distant from the stable) and met Hooghkirk there in a carriage, with two other horses, which were exchanged for the bay horses, which Hooghkirk took away, and that the witness and Nugent took the two horses received from him to the stable; that he asked Jones what he was doing; that Jones said, "if I (Strevell) would keep still he would give me fifty dollars," and further, "I did not want his fifty dollars, or know anything about his business, and I went home."

Nugent testified that when he saw Strevell coming, Jones was throwing the straw around the barn floor; that he told Jones that Strevell was coming, and "Jones caught the lamp and blew it out;" that Jones said to Strevell, "you keep still, and I will give you fifty dollars and a suit of clothes;" that Strevell said "he didn't want no fifty dollars, and didn't want to know nothing of his business."

It further appeared that the property in the barn was insured for \$1,000. The policy was put in evidence, and it was proved that the insurance company paid the loss. Hooghkirk testified that the policy at one time was in his possession, but that it was given to him after the fire to secure a loan, and that Jones, on some pretense, obtained it from him, and that he received no part of the insurance money.

The statute (*Code of Crim. Proc.*, sec. 399) declares that "a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as leads to connect the defendant with the commission of the

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crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances thereof. Prior to the statute the rule in this state permitted the jury to convict a defendant upon the uncorroborated testimony of an accomplice (*People agt. Costello*, 1 *Denio*, 83), but it was the uniform custom of judges to advise the jury that the evidence of the accomplice should be received with great caution, and it rarely happened that a conviction was had upon his unsupported evidence. The rule now embodied in the statute is substantially the rule which, before the statute, courts were in the habit of stating to the jury for their guidance, although, as has been said, it was not enforced as a rule of law. It is plain that independently of the statutory rule, corroborative evidence to have any value must be evidence from an independent source of some material fact tending to show not only that the crime had been committed, but that the defendant was implicated in it, and such is the doctrine of the best considered cases. But neither the doctrine hitherto declared by the courts, nor the rule embodied in the statute requires that the whole case should be proved outside of the testimony of the accomplice. Such a rule would render the testimony of an accomplice in most cases unnecessary and would defeat the policy of the law which permits the use of accomplices as witnesses in aid of, and in the interest of public justice.

We think there was evidence in this case tending to connect the defendant with the commission of crime charged against him, independently of the testimony of Jones and Nugent. The evidence of Strevell as to what took place at the barn in connection with the subsequent fire, leads to an inference of an incendiary burning. Indeed this is the only reasonable inference from the conduct of Jones in attempting to bribe Strevell to keep silence, interpreted in connection with the mysterious exchange of horses, the fire and the insurance. The connection of Hooghkirk with the felony is not directly shown by testimony independent of the accom-

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plices. But he is shown by Strevell to have been in the immediate vicinity of the stable shortly before the fire, engaged in the exchange of horses under suspicious circumstances. The fact that he purchased cheap horses, which were delivered to him on Sunday or Monday evening, is established by the testimony of independent witnesses, and is indeed admitted by Hooghkirk, and the jury may well have discredited his explanation of these transactions. The testimony of Feigenbaum that Hooghkirk brought the bay horses to his place on the night of the fire, or about that time, confirms Strevell in part of his story, and closely connects Hooghkirk with the transaction of the night of the fire. It cannot, we think, be doubted that the circumstances proved outside of the testimony of the accomplices show such a relation between Jones and the defendant, and such a sequence of events as to justify the inference not only that the crime of arson was committed, but that Hooghkirk was accessory to it. The claim that Strevell was himself an accomplice, was properly left to the jury. The transactions he testifies to may have aroused, and probably did arouse, his suspicions, but it is quite evident that he was not an original party to the scheme for burning the barn, and it was for the jury to determine whether, when the transactions testified to occurred, he had any guilty knowledge of the impending crime. The declaration of Jones to Nugent, in the absence of Hooghkirk, to the effect that the latter was engaged "in the business of burning barns," was coupled with the further declaration that he told Hooghkirk "what Jones said."

The court replied to the motion to strike out this evidence by saying: "I will retain it for the present. Your motion is good unless it is connected in some way." There was no subsequent motion made by the defendant in respect to this evidence. When the motion was made it appeared that the remark of Jones was communicated by Nugent to the defendant, and the exception to the disposition of the motion at that time was not well taken.

The questions put to Hooghkirk in his cross-examination

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with reference to his connection with other fires and with insurance on other property burned, were admissible in the discretion of the court as affecting his credibility, within the cases *People* agt. *Casey* (72 *N. Y.*, 393); *People* agt. *Woelke* (94 *id.* 137); *People* agt. *Irving* (*MS.*).

There are no other questions requiring notice. We find no error in the record, and the judgment should therefore be affirmed.

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## SUPREME COURT.

ANSON P. K. SAFFORD agt. CHARLES T. SNEDEKER.

*Complaint — Answer — Demurrer — When plaintiff may demur to answer — Demurrer to counter-claim, when defendant demands an affirmative judgment — Code of Civil Procedure, sections 494, 495, 496, 501.*

The complaint alleged that on a certain date defendant, by means of fraudulent representations, obtained money from plaintiff and gave him an instrument in writing, which was set forth, and continued in the ordinary form of a complaint in an action for fraud. Defendant pleaded as a defense that plaintiff, at about the time alleged in the complaint, agreed to carry on business with defendant and furnish the latter with \$2,000 working capital, and in consideration thereof defendant agreed to become responsible for the amount stated in the complaint, and executed a paper similar to the one pleaded by plaintiff; that plaintiff had failed to furnish the amount aforesaid and perform his contract. In a separate defense defendant pleaded the same matter by way of counter-claim and demanded affirmative relief. Plaintiff demurred to the defense as insufficient in law upon the face thereof, and to the counter-claim as insufficient in law upon the face thereof, and upon the further ground that it did not state facts sufficient to constitute a cause of action:

*Held*, that the demurrer to the counter-claim should be overruled, but as to the defense it should be upheld.

A demurrer to a counter-claim must specify the objections to the counter-claim, otherwise it may be disregarded.

*New York Special Term, May, 1884.*

DEMURRER to answer.

Plaintiff's complaint alleged that on a certain date defend-

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ant, by means of fraudulent representations, obtained money from plaintiff and gave him an instrument in writing, which was set forth and continued in the ordinary form of a complaint in an action for fraud. Defendant pleaded as a defense that plaintiff, at about the time alleged in the complaint, agreed to carry on business with defendant and furnish the latter with \$2,000 working capital, and in consideration thereof defendant agreed to become responsible for the amount stated in the complaint, and executed a paper similar to the one pleaded by plaintiff; that plaintiff had failed to furnish the amount aforesaid and perform his contract. In a separate defense defendant pleaded the same matter by way of counter-claim and demanded affirmative relief. Plaintiff demurred to the defense as insufficient in law upon the face thereof, and to the counter-claim as insufficient in law upon the face thereof, and upon the further ground that it did not state facts sufficient to constitute a cause of action.

*Oswald Prentiss Backus*, for plaintiff:

I. Admitting that plaintiff had agreed to do all that defendant alleges that he did, the moment plaintiff discovered that defendant's representations, by which plaintiff was induced to enter into the contract, were false, he was no longer obliged to fulfill his part of the contract. Defendant's fraud vitiated the contract.

II. The counter-claim does not "arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither is it connected with the subject of the action. The subject of the action is fraud, of the counter-claim, contract. The transaction pleaded by plaintiff consists of fraudulent representations — that related by defendant an agreement to enter into business. The counter-claim could not in the nature of things arise out of the transaction which is the foundation of plaintiff's claim (*Code, sec. 501; People agt. Dennison et al.*, 84 N. Y., 272).

III. The demurrer is sufficiently explicit. Section 494 of

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the Code allows of a demurrer to a counter-claim upon the ground that it is insufficient in law upon the face thereof. A failure to specify the particular defect under section 495, subdivision 4, is amendable under Code, section 723. An amendment to a demurrer may be granted by inserting a new ground of demurrer even after the case has been argued and submitted, provided a hearing on the amendment is allowed (*Pomesheik Co. agt. Cass Co., Sup. Ct. of Iowa, 18 Northwestern R.*, 895). If necessary an amendment should be granted inserting the ground of demurrer specified in subdivision 4 of section 495 of the Code.

*L. Laflin Kellogg*, for defendant.

VAN VORST, J.—The plaintiff demurs to the defendant's counter-claim under section 494, and the fifth subdivision of section 495 of the Code. I do not think that the objections are well taken, for the matter pleaded is sufficient to constitute a cause of action. Upon the argument of the demurrer the principal ground of objection urged was that the cause of action disclosed by the counter-claim did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and was not connected with the subject of the action. But no such objection to the pleading was raised by the plaintiff's demurrer. It is a distinct ground of demurrer under the Code, that the counter-claim does not disclose a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action (*Sec. 495, subd. 4; sec. 501, subd. 1*). And section 496 provides that the demurrer must specify the objections to the counter-claim, otherwise it may be disregarded. As the objections raised by the plaintiff to the counter-claim are very technical, he must be held strictly to the letter of the law to prevail in his contention. In this he has failed.

The matter pleaded in the third defense is insufficient in statement to constitute an answer to the action, and in so far

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as it is concerned the demurrer is sustained. But that defense becomes a part of the counter-claim which latter adopts it. The demurrer to the counter-claim is overruled, but as to the defense it is upheld. The plaintiff is however at liberty to withdraw his demurrer to the counter-claim and to reply to the same, and the defendant may amend his third defense.

As neither party has wholly succeeded, neither is entitled to costs.

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### N. Y. CITY COURT. .

PATRICK H. SMITH agt. HENRY BAUM.

*Attorney's lien—To what extent, and how enforced—Code of Civil Procedure, section 66.*

From the commencement of an action the attorney has a lien upon his client's cause of action, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they come, and cannot be affected by any settlement between the parties before or after judgment.

A settlement, after issue joined, had between the parties, although conclusive as to them, in no way affects the attorney, who may proceed in the action as if no settlement had been made.

But the lien cannot be enforced upon a mere motion to compel the defendant to pay the plaintiff's attorney his taxable costs by awarding a judgment therefor.

An application by "plaintiff's attorney" for an order directing the defendant to pay "his costs and counsel fee," or that he have judgment therefor, is not warranted by the practice.

*Special Term, July, 1884.*

*Justus Palmer, for motion.*

*J. B. Leavitt, opposed.*

McADAM, C. J.—The claim in suit belonged to the plaintiff, and he and the defendant had the right to meet, compromise and adjust it, and so far as the plaintiff is concerned, the settlement is conclusive. As to the plaintiff's attorney, a

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different question arises. From the commencement of an action the attorney has a lien upon his client's cause of action, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hand they come; and cannot be affected by any settlement between the parties before or after judgment (*Code, sec. 66*). The settlement had between the parties hereto, although conclusive as to them, in no way affects the attorney, who may proceed in the action as if no settlement had been made. Issue has been joined and the settlement has not been pleaded in defense, so that there is nothing upon the record indicating that such a result has been reached. The action may therefore proceed in the ordinary way (*Foreman agt. Edwards, 14 Weekly Dig., 408; Tullis agt. Bushnell, 65 How. Pr., 465*).

If a settlement has been effected, the parties made it with knowledge of the law which gave the attorney a lien upon the cause of action and the power to enforce it, and they cannot complain if he insists upon his right to do so. But the lien cannot be enforced upon a mere motion, like the present, to compel the defendant to pay the plaintiff's attorney his taxable costs by awarding a judgment therefor. The answer is substantially a general denial, and puts in issue the existence of the plaintiff's cause of action. The defendant is entitled to have this issue tried by a jury before he can be mulcted in costs. How far the amount paid in settlement may be taken as an admission of indebtedness must be determined at the trial. If the jury find that the plaintiff had no cause of action there will be nothing to which the lien of the plaintiff's attorney can attach. If, on the other hand, the jury find for the plaintiff, the lien of his attorney will attach to the verdict and the judgment entered upon it. The amount of the lien will presumptively, but not necessarily, be the amount of the taxable costs (*Tullis agt. Bushnell, supra, and cases cited*). If the plaintiff's attorney claims more, the amount may be determined by the court and the attorney allowed to enforce the judgment to the sum fixed.

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If a settlement is made before issue joined, and is pleaded as a defense (*Reimer* agt. *Doerge*, 61 *How. Pr.*, 142), the plaintiff's attorney should move for leave to prosecute the action to judgment in enforcement of his lien, and thus avoid the defense which, so far as the lien is concerned, is unaffected by the settlement (*Code*, sec. 66). Such a motion would in all probability be granted unless the defendant consented to discharge the lien by payment. A defendant who has made a settlement pending suit may, no doubt, apply to have the amount of the attorney's lien determined, with a direction that upon payment thereof the action be discontinued. The question of the manner of enforcing the lien of the attorney arises in so many different ways, and presents so many different phases, that it is difficult at times to apply the ruling made in one case to another arising under different circumstances (*See note to 10 Abb. N. C.*, 391). It is clear, however, that the application of the "plaintiff's attorney" for an order directing the defendant to pay "his costs and counsel fee," or that he have judgment therefor, is not warranted by the practice, and must be denied, but without costs.

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### N. Y. COMMON PLEAS.

SARA GOLDBERG, respondent, agt. D. ROBERTS, impleaded,  
&c., appellant.

*Examination of adverse party before trial—When order for should be granted—Code of Civil Procedure, section 872, subdivision 4.*

A plaintiff in an action has the right, under the Code of Civil Procedure, to an order for the examination of one of two defendants, to prove a copartnership between the defendants.

*General Term, May, 1884.*

*Before C. P. DALY, C. J.; LARREMORE and BEACH, JJ.*

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*Charles Bell*, for appellant.

*Walter M. Rosebault*, for respondent.

BEACH, J. — The plaintiff was granted by the court below an order for the examination of the defendant appellant, for the alleged purpose of proving a copartnership between the defendants, and that the defendant Morse acted by their authority when contracting with the plaintiff for her services. The order was affirmed by the general term of the city court and an appeal taken to this court.

There has been most frequent expression of judicial opinion upon the scope of the section of the Code of Civil Procedure giving this right, and the cases where an order for the examination of an adverse party should be granted.

In this court the order has been held proper in any case where a bill of discovery would have been upheld in equity (*Schepmoes* agt. *Bousson*, 52 *How. Pr.*, 701; *Phœnix* agt. *Dupuy*, 7 *Daly*, 238; 2 *Abb. [N. S.]*, 146). Whether or not this restriction should be applied under the existing statute is questionable (*Brisbane* agt. *Brisbane*, 27 *Supr. Ct. R.*, 48).

The testimony sought must be material and necessary for the party making such application, or the prosecution and defense of such action (*Code Civ. Pro.*, sec. 872, *subd.* 4). In this case the fact of partnership between the defendants must be proved by the plaintiff to make out her cause of action. It is material and necessary to the prosecution of her case, and her effort to establish it by the defendant's testimony does not indicate any desire or intent to discover what may be matter of defense.

In my opinion a bill of discovery could have been maintained for the same object. It was well said by the learned chief justice: "In equity a party was allowed to discover from his adversary any matter which was material to the establishment of his cause of action, \* \* \* and it was no answer to the application that the other party might be examined as a witness upon the trial, for the one filing the bill

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was not bound to call him as a witness on the trial, but might have a discovery previously from him as a party" (*Phoenix* agt. *Dupuy*, *supra*, and cases cited, p. 157).

The order should be affirmed, with costs and disbursements.

C. P. DALY, C. J., and LARREMORE, J., concurred.

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### SUPREME COURT.

JANE E. GARRISON agt. WILSON GARRISON and GUSTAVE HANNOCK.

EUGENE B. GARRISON agt. SAME.

LOVELETTE B. GARRISON agt. SAME.

*Code of Civil Procedure, sections 738, 1932, 1278 — Offer of judgment by one of several joint debtors or partners will not bind the others.*

There is no statutory authority allowing one joint debtor or partner to make an offer of judgment in behalf of his joint debtor or copartner.

"*The like offer*," as used in section 738, of Code of Civil Procedure, means that judgment must be taken against him who makes the offer if *separate* judgment can be taken.

Section 1932 of the Code of Civil Procedure, allowing judgments to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers.

*Schenectady Special Term, June, 1884.*

THE defendants above named are copartners. The plaintiff Jane E. Garrison is the wife of the defendant Wilson Garrison, and the plaintiffs Eugene B. Garrison and Lovelette B. Garrison, are sons of the plaintiff Jane E. Garrison and the defendant Garrison. On the 6th day of June, 1884, the plaintiffs each commenced an action in the supreme court, entitled against the defendants, by the service of a summons and complaint upon the defendant Wilson Garrison only. On the same day the defendant Garrison retained an attorney,

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who served upon the plaintiffs' attorney, offers in writing duly verified by said attorney, by which he offered to let the plaintiffs take judgments against both defendants for the full amount claimed in each case; said offers being signed by the attorney making said offers, as the attorney for the defendant Garrison.

The offers were accepted and judgments entered in Montgomery county clerk's office on the 6th day of June, 1884, in favor of each plaintiff and against the defendants. The defendant Hannock was not served with a summons or other process, and was in the same town at his place of business on said 6th day of June, 1884. The defendant Hannock moved at special term to set aside said judgments upon the grounds of irregularity and collusion.

*Richard Peck*, for defendant Hannock.

*George B. White*, for plaintiffs.

LANDON, *J.*—Section 738, Code of Civil Procedure, provides that the defendant may before trial serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him.

If there are two or more defendants and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. What is "*the like offer?*" Clearly, that judgment may be taken against him who makes the offer, if *separate* judgment can be taken. There is no statutory authority allowing one joint debtor or partner to make an offer in behalf of his joint debtor or copartner.

Section 1932, allowing judgment to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers. Section 1278 relates to confessions of judgment, not to offers. The common-law power of one copartner to act as the agent of the firm is limited to the ordinary business of the firm (*Mabbett* agt.

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McGean agt. MacKeller *et al.*

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*White*, 12 *N. Y.*, 442). The offer made in this case involves a question of statutory practice. The statute does not allow it.

The judgments entered against both defendants must therefore be vacated and the same orders in the other cases, with costs (*See Tripp* agt. *Sanders*, 59 *How.*, 379; *Burney* agt. *Le Gal*, 19 *Barb.*, 592; *Bredenbecker* agt. *Mason*, 16 *How.*, 203; *Everson* agt. *Gehrman et al.*, 10 *How.*, 301).

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### N. Y. SUPERIOR COURT.

McGEAN, &c., appellant, agt. MacKELLER *et al.*, respondents.

*Undertakings on appeal — When may be given by corporation — When not to be accepted — Code of Civil Procedure, section 1326.*

Where a plaintiff, desiring to appeal to the court of appeals, presents an undertaking executed by a corporation claiming authority under chapter 486, Laws of 1881, to guaranty the fulfillment of the conditions of undertakings on appeal, he should himself execute the undertaking.

Although the company guarantying the fulfillment of the conditions of the undertaking may be in the condition described in section 8, it is the duty of the judge in each particular case to exercise his discretion as to whether the actual state of the company's business justifies the approval of the undertaking. Such approval is entirely in his discretion.

*Special Term, August, 1884.*

O'GORMAN, J.—The plaintiff desiring to appeal to the court of appeals, presents for my approval an undertaking executed by a corporation claiming authority under chapter 486, Laws of 1881, to guaranty the fulfillment of the conditions of undertakings on appeal. The counsel for the respondent objects to the undertaking of this corporation, as now offered, on the grounds :

*First.* Because it is not given by the appellant.

*Second.* Because the examination of the secretary of the corporation does not show that its liabilities do not exceed its assets.

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McGean agt. MacKeller *et al.*

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The first of these objections should, in my opinion, be sustained. The appellant himself should execute the undertaking on appeal, and his undertaking may, according to the provisions of section 1, chapter 486, Laws of 1881, be accepted by the officer on whom is imposed the duty of approving of such undertakings, "whenever the conditions of such undertaking are guaranteed by the corporation."

The provisions of section 811 of the Code of Civil Procedure do not seem to me to apply to cases of this kind.

The second and more important objection is, whether on the evidence before me in this case, and in the exercise of the judicial discretion which in each case it is my duty to exercise, I should approve of the undertaking offered, as a sufficient compliance with section 1326 of the Code of Civil Procedure.

By section 1 of the act of 1881, above referred to, provision is made for justification on the part of the company, through its officers, as required by law of other sureties. It is provided by section 2 that the guaranty of any such company shall not be accepted whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section 3 of the act. The "manner provided" in section 3 is that the outstanding indebtedness shall be charged as liabilities.

Following this manner of ascertaining the liabilities of the company, and in strict and technical accordance with the terms of said sections 2 and 3, the secretary had stated figures showing a surplus of assets in the company of \$105,122.29.

It is in evidence, however, that this company has been in the habit, not only of guaranteeing bonds and undertakings on appeal and the fidelity of public and private officers, but has also issued policies of insurance against accidents endangering human life, against breakages of plate glass, against explosions of boilers, &c.; and how many of such policies have been issued and are now in force, and what is the aggregate amount of risks thus incurred and the amount of liabilities therefor, the secretary in his examination was unable to state, and I am not informed.

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Straus agt. Kreis.

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In the case of *Earle* agt. *Earle*, decided by the general term of this court, in which case the questions now before me were considered, the court says: "Although the company may be in the condition described in section 3, it is the duty of the judge in each particular case to exercise his discretion as to whether the actual state of the company's business justifies the approval of the undertaking."

Following that rule, in the propriety of which I concurred, I find myself in this particular case without sufficient information as to the actual state of the company's business, and therefore unable to approve of their undertaking.

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## CITY COURT OF NEW YORK.

MOSES STRAUS agt. EMIL KREIS.

*Arrest—Order of, under subdivision 4, section 549, Code of Civil Procedure—  
When must be vacated—Complaint must be presented with motion for the arrest.*

In an action upon contract the imperative requirement is, that it must be alleged in the complaint that the defendant was guilty of fraud.

Where there is no complaint presented with the motion for the arrest, and the affidavits do not aver what the allegations of the complaint were, the order of arrest will be vacated.

*Special Term, June, 1884.*

HYATT, J.—This is a motion to vacate the order of arrest herein, upon the ground that there was no complaint presented with the motion for the arrest, and that the affidavits did not aver what the allegations of the complaint were. Although there is no proof before the court that there was no complaint, yet it was conceded upon the argument that there was none. Subdivision 4 of section 549, Code of Civil Procedure provides that an order of arrest may issue in an action "on contract, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting the liability." The language of the law is clear and unqualified; its imperative requirement.

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Straus agt. Kreis.

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is, that it must be alleged in the complaint that the defendant was guilty of fraud. This has been directly decided by the general term of the superior court of New York city in the case of *Lawrence agt. Foxwell* (4 *N. Y. Civ. Pro. R.*, 351).

The provision is an exceptional one, but it is possible that in view of the notorious fact, that the right to an order of arrest was most frequently abused in cases embraced in subdivision 4, of section 549, Code of Civil Procedure, the legislature determined to require this additional safeguard in this class of cases; but whatever may have been the motive, the language is free from doubt and the absence of the complaint or of affidavits averring the allegations of the complaint, is fatal to the order of arrest.

I am not unmindful of the case of *O'Shea agt. Kohn*, (decided at the general term, New York supreme court, first department, May 29, 1884), wherein the court affirmed an order denying a motion to vacate an order of arrest. The learned justice, writing the opinion of the court says, "the motion was made because of the alleged insufficiency of the affidavits on which the order was founded," and after showing the sufficiency of the affidavits he states that "when the complaint shall be served, allegations containing statements of these facts will set forth a cause of action for the fraudulent purchase of the plaintiff's property, and the right to damages for its value."

Assuming the facts of that case to be similar to those constituting the case at bar, yet it does not appear in the said opinion that the question here at issue was raised or considered. The sufficiency of the affidavits having been there determined, it would seem that the further statement recited in the opinion was *obiter*, and whatever may be the natural inference to be drawn therefrom, it cannot bring the decision within the doctrine of *stare decisis*, as applicable to the case at bar.

It follows that the motion will be granted, upon condition however that the defendant stipulates not to sue for damages arising out of the order of arrest.

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People on the Relation of the Walkill Valley R. R. Co. agt. Keator *et al.*

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SUPREME COURT.

THE PEOPLE ON THE RELATION OF THE WALKILL VALLEY RAILROAD COMPANY agt. NATHAN KEATOR *et al.*, assessors, &c., of the town of Rosendale.

THE SAME agt. ABRAM P. KEATOR *et al.*, assessors, &c., of the town of Rosendale.

*Railroads — Taxation of — Basis of assessment — Evidence of value — Certiorari to review assessment.*

In estimating the value of railroad property within the town, the assessors are not to be governed solely by its costs, but rather, though not exclusively, by its productiveness for railroad purposes.

The value of railroad property must almost entirely depend upon its capacity to earn money for its owners. It should be valued as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profit of its use for that purpose.

Upon a trial upon an issue raised upon *certiorari*, to review an assessment on railroad property, as excessive as compared with the valuation of other property in this town, where it was made to appear that while the property in the town other than the railroad property had not been assessed or valued at a greater sum than forty per cent of its actual value, computed as the statute requires it to be computed, while such railroad property had been valued and assessed at its full actual value: *Held*, that the valuation of the railroad property should be reduced sixty per cent.

On *certiorari* to review an assessment, costs will not be awarded against the assessors, unless it is found that the assessors have acted in bad faith in making such assessment.

*Ulster Special Term, May, 1884.*

CERTIORARIS to review assessments of the relator's real estate in the town of Rosendale in the years 1880 and 1881.

*Peter Cantine, S. L. Stebbins and F. L. Westbrook*, for relator.

*A. T. Clearwater and J. V. V. Kenyon*, for respondents.

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WESTBROOK, *J.* — The real estate of the relator in the town of Rosendale was valued upon the assessment-roll of the town in the year 1880 at \$62,000, and in the year 1881 at \$70,000. Claiming that such valuations were excessive as compared with the valuations of the other property in the town, the relator by writs of *certiorari* asks that such assessments be reviewed and corrected.

The statutes of this state (2 *R. S.* [7th ed.], 994, *sec.* 8) have, in prescribing the form of the oath which the assessors must append to their assessment-roll upon the completion of the assessment, declared the rule which is to be observed by them in their valuations of real estate for the purposes of taxation. Those statutes require them to swear that they “have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor.”

In complying with this provision of the law, as a railroad property cannot as a dwelling have any fancy value by reason of its location or the expenditure thereon of large sums of money which would conduce to the comfort of the owner, it is evident that the assessors in fixing its value must be very largely controlled by its ability to earn money, and the productiveness of its use for the purposes of a railroad. As an original question it would seem to be reasonably clear that the value of railroad property must almost entirely depend upon its capacity to earn money for its owners, and that therefore no creditor would receive from a solvent debtor in payment of his debt, railroad property at a greater price than that which would be a fair one based upon its earning capacity.

It is not, however, necessary to argue this as an original question, as in the case of *The People ex rel. Ogdensburg and Lake Champlain Railroad Company agt. Pond* (13 *Abb. N. C.*, 1), this court held that “the taxable value of a railroad should not be determined alone by the long narrow strip of land for farming or any other purpose, except its use for the bed of a rail-

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road. Nor should the portion of a railroad situated in a particular town be estimated by the cost of any expensive rock cut or quicksand filling, or a long tunnel located in that town. It should be valued as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profits of its use for that purpose."

This principle must have been concurred in by the court of appeals (92 *N. Y.*, 643), because that court, when the case came before it for review, dismissed the appeal on "the ground that there was sufficient evidence to authorize the supreme court to exercise its discretionary power," which conclusion that court could not have reached, if, in its opinion, the supreme court had adopted a wrong legal principle in estimating the value of the railroad (*See in this connection The People ex rel., &c., agt. Barker*, 48 *N. Y.*, 70, 77).

With this rule as the guide to determine the value of the real estate owned by the relator, it is apparent that the cost of the structure of the relator in the town of Rosendale, and the expensive bridge which spans the Rondout creek within its limits, has very little, if anything, to do with the valuation of its property by the assessors of such town. Indeed, a large expenditure of money through a town in the construction of a railroad made necessary by bridges, excavations and fillings, rather depreciates than adds to its value for railroad purposes, because the necessary repairs to a structure, largely composed of bridges, cuts and fills, must be considerably in excess of those required upon a railroad track running over a level country, in which there is comparatively little of bridging, excavating and filling. In determining then the value of the real estate of the relator in the town of Rosendale, the rule adopted by this court, both at special and general terms, and confirmed by the court of appeals, will be followed.

The total length of the railroad of the relator in the town of Rosendale, is 7.3520-10,000 miles, which to make the gross valuation of the assessors, must have been valued at a sum of between \$9,000 and \$10,000 per mile.

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The length of the entire road of the relator, extending from Montgomery in the county of Orange, to the city of Kingston, in the county of Ulster, is thirty-three miles.

The gross earnings of such road from September 30, 1878, to September 30, 1879, were \$85,012.14; its operating expenses during the same period were \$60,766.69; its taxes were \$9,822.31, leaving its net earnings during that period \$14,423.14. From September 30, 1879, to September 30, 1880, its gross earnings were \$100,760.43; its operating expenses were \$70,376.74; its taxes were \$9,050.98; and its net earnings were \$21,332.71. From September 30, 1880 to September 30, 1881, its gross earnings were \$103,877.68; its operating expenses were \$83,453.29; its taxes were \$10,145.16; and its net earnings \$10,279.23.

The average earnings per year during the three years were \$15,345.02, or thereabouts, which would be equivalent to six per cent interest upon a capital of about \$255,750, or to five per cent upon a capital of about \$306,900. It would seem that five per cent is not an unreasonable rate of interest to be obtained from an investment in a railroad property, and to produce that revenue to the owners the property of the relator should not be valued at a greater or higher sum than at the rate of about \$9,300 per mile, which is a sum considerably larger than the value placed upon it by the expert witnesses examined in behalf of the relator, and a good deal less than its estimated value by the testimony produced on the part of the respondents. From the data and figures above given, which seem to me to be better and safer guides to the value of the property than the opinions of witnesses, or sales of property under peculiar circumstances, it would appear that the property of the relator in the town of Rosendale has not been overvalued, and therefore if the only error complained of was an excessive valuation put upon its property, the relator would have no just cause of complaint. It claims, however, that while its property has been valued at a sum equal to its entire and actual value, the same rule of valuation has not been

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applied to the other property in the town. Is this claim by the relator just?

In the consideration of this question great difficulty has been experienced, and after a careful examination of the voluminous testimony given upon these proceedings, it is difficult to reach a satisfactory conclusion as to the rule which the assessors have adopted in making up their assessment. We have, however, some general facts which throw more or less light upon that question, and they are these:

*First.* In the year 1880 there was no personal property assessed in the town of Rosendale. In the year 1881 the total of personal property assessed in such town was \$5,300, and in 1882 the total amount of personal property assessed was only \$800. It would seem to be almost incredible that in a town in which there are many valuable farms, large cement manufacturing establishments, numerous stores and hotels and many well furnished dwelling-houses, that there was no personal property liable to be taxed during one year and so inconsiderable an amount during two other years.

*Second.* The valuation of the property of two corporations, to wit: The Walkill Valley Railroad Company and the Delaware and Hudson Canal Company, is between one-third and one-half of the entire property of the town.

*Third.* The records of the county clerk's office of the county of Ulster show sales of real property in the town from 1878 to 1881 aggregating about the sum of \$47,575.75. These properties were valued upon the assessment-roll of the year 1880 at \$12,950, and in 1881 at \$11,725.

*Fourth.* Tenement houses belonging to William Campbell are valued upon the roll of 1880 at \$600 and of 1881 at \$650. This property is insured for the sum of \$2,900 and its rental is \$456 per year. Premises belonging to George B. Elting are valued at \$550 upon the roll of 1880 and at \$700 upon that of 1881. These premises have been mortgaged to secure the sum of \$1,500 and are worth about double that amount. A house and premises belonging to Lewis C. Bowen worth

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from \$3,000 to \$4,000 are valued on the roll of 1880 at \$550 and upon that of 1881 at \$450. A house and premises belonging to Calvin Keator worth in the neighborhood of \$2,000 and mortgaged for \$1,000, are valued upon the roll of 1880 at \$400, and upon that of 1881 at \$450. The property of Abram Sammons, consisting of a large hotel building, a blacksmith shop, a large barn, a shed, a three-story brick building, and a frame dwelling-house, worth at least from \$10,000 to \$12,000, and mortgaged for the sum of \$5,500, and insured for \$5,000, are valued upon the roll of 1880 at \$2,500, and 1881 at \$2,400.

It is worthy of note in connection with this property that Nathan Keator, one of the assessors of the town of Rosendale, gave a certificate when an application was made for a loan that a part of this property was worth \$12,000.

The house and premises of Dr. Simon Schoonmaker, worth about \$3,000 or more, are valued in 1880 at \$600 and in 1881 at \$500. The premises of James E. Deyo, consisting of a farm of 140 acres, 100 of which are under cultivation and sixty acres bottom lands of the Walkill, with buildings, upon which there is an insurance of \$2,500, is valued upon the assessment-roll at \$3,250. A farm of Peter E. Snyder, consisting of 101 acres of land, seventy-five of which are cleared, and twenty-six, consisting of timber, with buildings thereon, which are insured for \$1,200, is valued upon the assessment-roll of 1880 at \$1,900, and upon that of 1881 at \$1,800. A farm of Nathan Keator, consisting of 128 acres, and to extinguish a dower right in which he paid to his mother the sum of \$6,500, was assessed upon the roll of 1880 at \$3,000 and upon that of 1881 at \$2,800. A farm of John V. James, consisting of 100 acres and actually sold in the year 1880 at \$6,500, was assessed upon the assessment-roll of 1880 at \$2,000, and upon that of 1881 at \$1,200. The property of Conrad Schinnen, consisting of a three-story brick hotel in the village of Rosendale, a frame building in which there are two stores, with six vacant lots adjoining the hotel of equal size and value, three of which

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lots were after the assessment sold for \$2,000, is valued upon the roll at the sum of \$1,800.

It is impossible, however, to take each piece of property in detail and criticise the assessment made thereon. Those which have been given have been selected at random as showing fairly the rate of valuation adopted in making assessments.

In reaching the conclusion that the property in the town, other than that of the relator and the Delaware and Hudson Canal Company, has not been valued at a sum exceeding forty per cent of its actual value, such conclusion is believed to be liberal towards the town, much more liberal in fact than would seem to be justified by some of the valuations hereinbefore stated. The fact is, as is well known, though not a part of the evidence in the cause, that in a careful estimate made of the whole property in the town of Rosendale, by persons competent for that purpose, for and on the appeal made to the state assessors during the past year, it was ascertained that the valuation of the property upon the assessment-rolls of the town of Rosendale, apart and separate from that owned by the relator and the Delaware and Hudson Canal Company aforesaid, was not to exceed thirty-six per cent of its actual value.

The result of my examination of these cases is, that as the property in the town of Rosendale, other than that belonging to the relator and the Delaware and Hudson Canal Company, has not been assessed or valued at a greater sum than forty per cent of its actual value, computed as the statute requires it to be computed, that the valuation of the property of the relator should be reduced sixty per cent.

There remains one other question to be determined, and that is the question of costs. It is also exceedingly difficult to determine what would be just in that particular. The general presumption of law is, that officers intend to perform their duty honestly and conscientiously, and such presumption can only be overcome by clear evidence. There are isolated cases of valuation upon the assessment-rolls in the town of Rosendale, in which it would seem to be difficult to reconcile

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the valuations with a conscientious discharge of duty by the assessors, but in looking at the assessment as a whole, and in view of the fact that the making up of the assessment-rolls involved a difficult question of law for the assessors to decide, to-wit, how should the property of a railroad corporation be valued? in determining which they may have made an honest mistake, I have deemed it better and safer not to reach the conclusion that the assessors acted in bad faith, and therefore to impose upon them the costs of these proceedings.

The orders to be entered in these cases will, therefore, be in accordance with the conclusion above announced, without the imposition of costs upon the defendants.

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N. Y. COMMON PLEAS.

In the Matter of the Assignment of HENRY ADAMS and PETER HORNE, composing the firm of R. & H. ADAMS, to EDWARD C. HAZZARD and WILLIAM C. FENNER, for the benefit of creditors.

*Assignment — Unliquidated damages not provable against assigned estate.*

An unliquidated claim for damages is not provable against an assigned estate in the hands of assignee.

Insolvent proceedings extend only to such debts as were due at the time of the assignment. Such debts must be specific and certain sums of money to which the creditor can make oath as being justly due or to become due at some specific time; and unless the creditor, at the time of the assignment, be able to produce and verify such debt, he will not be entitled to receive from the assignees his dividend of the insolvent effects, nor will he be barred from his future action against the insolvent.

*General Term, June, 1884.*

*Before C. P. DALY, C. J., LARREMORE and BEACH, JJ.*

*Hugh Porter, for assignee.*

*Chambers, Boughton & Prentiss, for Talcott, claimant.*

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DALY, C. J. — The claim of damages for a breach of contract was not provable as a debt under the assignment. It has been settled by a long series of decisions that unascertained claims for damages were not provable as debts in proceedings in bankruptcy; that in claims for damages arising from breaches of contract in indemnity bonds and other possible liabilities, the damages must be ascertained and fixed before the act of bankruptcy to entitle the claim to be proved as a debt of the bankrupt, unless the contingent liability is one that has been specifically allowed by statute, and the actual prospective value of which at the time of the bankruptcy is capable of being ascertained by some mode of computing or estimating (*Ex parte Marshal*, 1 Mon. & Ay., 118; *Ex parte Thomson*, 1 Mon. & Bli., 219; *Ex parte Tyndal*, 1 Dea. & C., 291; *Yellop agt. Evarts*, 1 Barn. & Ad., 698; *Bourman agt. Nash*, 9 B. & C., 145; *Allwood agt. Partridge*, 4 Bing., 209; *Lancashire Coal Co., Mont.*, 27; *Wooly agt. Smith*, 3 Com. Bench, 610).

Formerly in bankruptcy proceedings in England, the claim had to be due at the time of the act of bankruptcy, and the liability upon a promissory note, not due until afterwards, was not provable. But this was relaxed by provisions in subsequent statutes which allowed contingent liabilities to be proved; where, as before stated, the value could be estimated, and under our own bankruptcy act, claims for unliquidated demands, arising out of any contract or promise, was allowed; but unless, where changes have been made in this way by statute, the rule has been as above stated. The reason of it was, as the bankrupt, under the act was to be discharged from his debts, the proceeding was to be strictly confined to what was regarded as a debt; and for the further reason that the creditors whose claims were ascertained and fixed when the bankrupt went into or was brought into bankruptcy, were entitled to share in the distribution of his estate as soon as it was gathered in, and were not to be delayed by claims against him sounding in damages, which it might take years to determ-

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ine. It was said that the assets were not to be locked up, pending such uncertain litigations, but that matters were to be adjusted according to the relative liabilities of the bankrupt, as they were ascertained and known at the time of the act of bankruptcy and as his estate then existed. That it was not proper to keep the property, or a certain part of it, until it was ascertained whether somebody who had a claim to damages, which it might take years to determine, would recover any or not (*Ex parte Marshal*, 1 *Mont. & Ay.*, 118). In which connection I may mention that I have known cases in our own court in which actions for the recovery of damages, through mistakes and new trials, remained in the court for ten years before they were finally determined.

The grounds upon which unascertained claims of the nature of the one here presented were not allowed to be proved as debts in bankruptcy, apply with equal force in cases of voluntary assignments for the benefit of creditors, and indeed more so, because there the instrument itself provides how, and to the payment of what debts the property assigned shall be applied, and unless the assignment is impeachable for fraud, or otherwise invalid, the question is one to be gathered from a fair construction of the instrument, and not from the provisions of any statute (*Bishop on Assignments*, chap. 27).

The assignment is not set forth in the case as made up, but its provisions as to the manner in which the assigned estate is to be applied, is stated in the defendant's points to be, as is usual in such instruments, that the estate is to be converted into money and applied to the payment of the just debts of the assignors.

The question then is, what is to be understood as debts within the intention of the assignment.

A debt, says Sir John Cross, in *Ex parte Thomson* (*Mont. & Bl.*, 219), "is a demand for a sum certain;" and it is, says Commissioner FONTBLANGUE, in *Ex parte Marshal* (1 *Mont. & Ay.*, 118), "a sum actually ascertained." "That there must be," he says, "an ascertained debt, and not an unliquidated

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demand or liability, is sustained by all the cases, legal and equitable. It must be a debt existing and ascertained at the time of bankruptcy." \* \* \* "The distinction," he says, "between debt and damages has always been rigorously adhered to."

The same exposition of what is considered a debt is to be found in our own cases. It imports, says chief justice MONNELL in *Zirn* agt. *Ritterman* (2 Abb. [N. S.], 262, 263), a sum of money arising on contract and not a mere claim for damages; in which it was held that in our insolvent acts it does not extend to actions where the damages are unliquidated.

In the *Matter of Denny* (2 Hill, 220), which was a proceeding in this court under the insolvent debtor's act, which, as first enacted, allowed the trustees to sue for debts or demands, but which was afterwards limited to debts, it was held that the word demand is of much broader import than the word debt, and would embrace rights of action belonging to the debtor beyond those which could be called debts.

In *Losee* agt. *Bullard* (54 How., 320), where a stockholder of a corporation was sought to be made liable under the statute for a debt, it was held that a claim for damages was not a debt within the meaning of the statute.

In *Kimpton* agt. *Bronson*, where the question of what was a debt under the United States statute making treasury notes a legal tender for debts, it was held that the voluntary payment of a specific sum of money in discharge of an obligation was, within the meaning of that statute, the discharge of a debt.

In *Kennedy* agt. *Strong* (10 Johns.) it was held that, under the insolvent act, goods received by the insolvent as a factor or trustee was not a debt within the meaning of the insolvent act; that the insolvent's discharge would in no way affect it, but that he remained equally liable to be sued upon it, as well after as before his discharge. And in *Mechanics and Farmers' Bank* agt. *Capron* (15 Johns., 467) it was held that the insolvent's liability as indorser of a promissory note which was

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not due at the time of his discharge, did not constitute a debt which was or could be discharged by that proceeding, which extended only to debts that were due at the time of the assignment of the insolvent's estate, or debts contracted before that time and payable afterwards ; that it was a general and well settled rule that if the creditor, at the time of the assignment by the insolvent debtor, has not a certain debt due or owing to which he can attest by oath, so as to entitle him to a dividend of the insolvent's effects, it is not embraced in that proceeding ; and as, in that case, the liability of the insolvent at the time of the assignment was merely contingent — that is, upon the non-payment afterwards of the note by the maker — it was held that the holder of the note was in no way affected by the insolvent's discharge, but might maintain an action thereafter against him ; which was reaffirming substantially a prior decision of chancellor KENT in *Frost agt. Carter* (1 *Johns. Cases*, 74), in which the chancellor (then a judge of the supreme court) held that the insolvent's proceedings extended only to such debts as were due at the time of the assignment. That "such debts must be specific and certain sums of money to which the creditor can make oath as being justly due or to become due at some specific time ; and unless the creditor, at the time of the assignment, be able to produce and verify such a debt, he will not be entitled to receive from the assignees his dividend of the insolvent's effects, nor will he be barred from his future action against the insolvent." And this rule, that the liability at the time of the assignment must be ascertained and fixed at a sum certain, whether payable before or after the assignment, to entitle the creditor to a dividend of the insolvent's estate, has been recognized in many other cases both in this state and elsewhere.

Under the act (*N. Y. Laws of 1877, chap. 466*) regulating voluntary assignments, the creditor at the time specified in the notice must come in and prove his claim or he is debarred from participating in the distribution of the estate (*Kerr agt. Blodget*, 48 *N. Y.*, 62). The act (*sec. 13*) contemplates that

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the creditors shall prove their claims, and it is the practice to do this by affidavit.

In this case there could be no compliance with the rule laid down by chancellor KENT in *Frost* agt. *Carter* (*supra*), for there was no debt of a certain or specific amount due at the time of the making of the assignment, or in fact any debt due then, for it was by the making of a general assignment for the benefit of creditors that Adams & Horne put it out of their power to perform the agreement made by Adams with Talcott, and it is this which Talcott relies upon as constituting a breach of the agreement. It is upon this that his claim rests, so that the claim did not come into existence until after the assignment.

The referee has found that the making of a general assignment by R. & H. Adams and their consequent inability thereafter to manufacture and supply Talcott with goods did not amount to a breach of the agreement. He has found, however, that Talcott was entitled to receive for sale under the agreement the goods which were manufactured and in the hands of R. & H. Adams at the time of the assignment, but that it did not appear that Talcott had suffered any loss or damage by these goods not being consigned to him.

The referee in his opinion states generally that there was nothing before him upon which it would have been possible for him to have estimated the amount of profits that would or might have been realized if the contract had been fulfilled.

That any estimate on the facts before him would have been purely speculative and wanting in that reasonable certainty which the law requires.

This conclusion was, I think, undoubtedly correct, so far as regards the claim for loss of profits on goods to be manufactured thereafter and delivered during the whole period for which the agreement was to run. In the affidavit of the claim, Talcott swore that the insolvent firm was justly indebted to him in the sum of \$170,000, for damages arising from the breach of the contract; but, upon his examination, through various errors and mistakes, the amount sworn to in his affi-

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davit as \$170,000 was reduced by him to \$130,000. The greater part of this claim, as thus reduced to \$130,000, as appeared from his examination, was an estimate made by him upon the assumption that the sales for the following three years would be the same, or at least not less per year than they had been during the short period that the agreement was carried out. This could not be assumed in respect to the sales of this commodity, consisting of manufactured silks and cottons, for the long period of three years thereafter; and the referee properly refused to find, as requested, that it appearing that the yearly sales by the firm of the production of their mills had been \$1,000,000 annually, and the annual expenses had been \$23,000, the law would presume, in the absence of evidence to the contrary, that the future sales would have yielded the same returns, under the same expense, and that Talcott was entitled to have his damages for loss of prospective profits computed upon that basis.

The law makes no such presumption. Profits are recoverable as damages where it can be shown with reasonable certainty what the party would have received if the contract had been fulfilled, as appears in the leading case of *Masterson agt. The Mayor, &c., of Brooklyn* (7 Hill, 52), which the appellant cites, and on which he relies. The plaintiff there had a contract to furnish marble from a specified quarry, at a specified sum, for the erection of a city hall, which, by a contract made with the owners of the quarry, he was to receive at a smaller sum than he was to get for the marble when delivered for use in the building. That difference constituted his profit, the whole of which prospectively could be accurately ascertained by the proof of that amount, and of the amount of marble he was, by the contract, to deliver to the defendant, and it is only in such cases, where the prospective profits can be shown with reasonable certainty, that they can be recovered as damages (*Mayne on Damages*, 15 and 18).

It may have been possible to have ascertained with reasonable certainty the amount of profits that could have been

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obtained on the sale of the goods which R. & H. Adams had manufactured and on hand at the time of the assignment, if they had been delivered, by proof of the market price at that time, and, in accordance with the referee's finding, an action for damages for the non-delivery of these goods may have been maintainable against the members of the firm. However that may be, the goods were not delivered, and this was, after the assignment, simply a claim for an unascertained amount of damages, which was not provable under the assignment as a debt.

The appellant requested the referee to find—which the referee would not—that upon the refusal of the assignee to deliver, upon demand, the goods manufactured and on hand at the time of the assignment, he, Talcott, was entitled in this proceeding to an order or decree that they make such delivery to him or account to him, as assignee, for the proceeds of these manufactured goods.

The assignee could not be compelled to fulfill, by the delivery of goods, the unperformed contract of R. & H. Adams at the time of the assignment. No authority or power was given them, in that instrument, to do so. All the property of the firm, was, I assume, as is usual in such instances, conveyed to them subject to the trust already referred to, to convert it into money, and apply the money to the payment of the just debts of the firm, which was what they had to do and all they could do.

The conclusion from what has been stated is, that Talcott's claim does not come under this trust, because it was not a debt, but a claim for damages unascertained, which is sufficient to dispose of this appeal, without deciding whether the referee was right or wrong in holding that the making of a general assignment for the benefit of creditors was not a breach of this agreement and other questions incident to it in the case.

The judgment therefore entered upon the referee's report should be affirmed.

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Fairlee agt. Bloomingdale.

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SUPREME COURT.

ELIZABETH FAIRLEE agt. FRANCES M. BLOOMINGDALE,  
impleaded with PETER BLOOMINGDALE.

*Husband and wife — Law of — Business partnership between them not authorized — Contracts in the conduct of such business not enforceable against the wife.*

Business partnerships between husband and wife are not authorized by the statutes of the state of New York, and contracts in the conduct of such business are not enforceable against the wife.

Any declaration of the wife that she sustains the relation to her husband of a partner in business is not binding upon her.

The case of *Zimmerman* agt. *Erhard and Dodge* (58 How., 11) criticised and not followed.

*Special Term, July, 1884.*

MOTION for a new trial on the judge's minutes.

*Mr. Miller* and *Mr. Brown*, for plaintiff.

*Mr. Stevens* and *Mr. Mayhem*, for defendants.

WESTBROOK, J. — This cause was tried at the Schoharie circuit in October, 1883. The action was upon a promissory note dated April 1, 1876, by which the defendants, who were, at the date of the execution of the note, husband and wife, promised to pay "Elizabeth Fairlee (the plaintiff), or bearer, two thousand dollars, with interest, for value received." The note was signed "P. Bloomingdale," "F. M. Bloomingdale," and contained no clause charging the separate estate of the wife, who alone defended.

According to the testimony of the plaintiff, the consideration of this note was an old note made by the same parties for \$1,300 and \$700 cash. She further testified that the wife, at the time the money was loaned and the note in suit given, stated they needed the money for goods, that she would see it paid, that she was as much interested in the business as her

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husband, and that the money was loaned by the plaintiff on the faith of such statement. She further said that the first note was ~~executed~~ by both defendants, that it was also for borrowed money, and that such first loan was upon a statement by the wife to the same effect as to her interest in the business, with the one made by her when the note in suit was given.

The defendants, on the other hand, testified that they had never been partners; that the first note was signed by the husband alone, and that neither at the giving of the first or the second note was there any statement by the wife that she was interested in business with the husband.

The jury was charged that if the plaintiff loaned the \$700 on the representation of the wife that she was interested in the business with the husband, she was entitled to recover the \$700, with interest; and if the wife had signed the first note, and the loan which the note evidenced had been made upon the faith of the wife's statement that she was interested in the business with the husband, then the plaintiff was also entitled to recover the amount of the first note included in the second; but that the plaintiff was not entitled to recover the amount of such first note unless it had been executed by the wife, and she had also, at the time of its delivery and execution, made the statement attributed to her.

The jury rendered a verdict in favor of the plaintiff for the whole amount of the note, with interest. The defendant, the wife, having made a motion for a nonsuit, which was refused, moves for a new trial upon the minutes, founded upon exceptions taken to the refusal to grant the nonsuit, and also to the charge as made.

The motion for a new trial presents this one question: Are the contracts of husband and wife, professing to be made by them as partners in business, enforceable against the wife?

The obligation upon which the action was brought did not by its language expressly charge the separate estate of the wife. It was a joint and several promissory note in the

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ordinary form, signed by the husband and wife separately, by which they or either of them promised to pay the plaintiff or bearer "two thousand dollars, with interest, for value received." To recover upon such a note, therefore, as it was made long prior to the enactment of chapter 381 of the Laws of 1884, it was incumbent upon the plaintiff to show that it was given in or about a trade or business carried on by the wife, or that it was for the benefit of her separate estate (*Manchester agt. Sahler*, 47 *Barb.*, 155; *Bojert agt. Gulick*, 65 *Barb.*, 322; *Yale agt. Dederer*, 22 *N. Y.*, 450; *Second National Bank of Watkins*, 63 *N. Y.*, 639; *Nash agt. Mitchell*, 71 *N. Y.*, 199). That the note was for the benefit of the wife's business was sought to be established by her declaration made at the time of its execution and delivery, to the effect that she was equally interested with her husband in the business, which they were conducting. It was not pretended or claimed upon the trial that the business was the sole business of the wife, nor that she had any other connection therewith than as the partner of her husband. The case, therefore, presents sharply the question of the legal possibility of the existence of a mercantile partnership between husband and wife.

Such partnership, or any partnership between husband and wife would certainly have been impossible at common law. The rule then was "the husband and wife are one person in law \* \* \*. The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything" (1 *Bl. Com.*, 442). The legal conclusion, which the same author states as flowing from the unity of the persons of husband and wife, that the husband cannot covenant with the wife because it "would be only to covenant with himself," clearly forbade a partnership between them, which could only exist between persons having a separate legal existence and the one capable of contracting with the other. This rule of the common law

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is not questioned, but it is claimed that it has been abrogated by the statutes of this state, or at least so far abrogated as to permit the formation of a business partnership between them, and consequently the making of all agreements, contracts and covenants with each other upon which the existence of such a relation depends. Is this position sound?

The discussion of this question must begin with a recognition of the fact that our legislation has not entirely destroyed "the common law unity of husband and wife, and made them substantially separate persons for all purposes" (*Per* EARL, J., in *Bertles* agt. *Nunan*, 92 N. Y., 152, see p. 159). The wife can only make such contracts as positive enactments allow. Her ability "to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute" (*Per* EARL, J., in the same case, p. 160). With this recent and deliberate utterance of our court of last resort, substantially repeated in a still later case (*Coleman* agt. *Burr et al.*, 93 N. Y., 17) before us, we must, to uphold a partnership between husband and wife, find a statute authorizing it.

Section 2 of chapter 90 of the Laws of 1860, is the provision relied upon to validate such an agreement. The act is entitled "An act concerning the rights and liabilities of husband and wife," and the section referred to reads thus: "A married woman may bargain, sell, assign and transfer her separate personal property and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name."

In determining the effect of this section, a well recognized principle of interpretation must also be observed, that "it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not

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intend to make any alteration, other than what is specified, and besides what has been plainly pronounced, for if the parliament had had that design, it is naturally said they would have expressed it" (*Potter's Dwarries on Statutes*, 185).

The literal interpretation of the words of the statute is that the wife is thereby authorized to "carry on any trade or business, and perform any labor or services on her sole and separate account," and when the "trade or business" and "labor or services" are carried on or performed on her "sole and separate account," the earnings therefrom then, and only then, become "her sole and separate property."

Precisely this construction was given to the act by the court of appeals of this state in *Coleman* agt. *Burr et al.* (93 *N. Y.*, 17, see pp. 24 and 25), that court saying: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each to the other remain as they were at common law."

In a partnership there can be no "separate property and business," and the "labor" performed by one partner in connection therewith cannot possibly be on the "sole and separate account" of the partner performing it. There must in every such case necessarily be a joint, and not a "separate property and business" and services on joint account, and not on the "sole and separate account" of one partner.

As then the unity of husband and wife at common law forbade a business partnership between the two, as the common law has only been abrogated so far as express statutes have clearly indicated an intent to abrogate, and as all statutes abrogating the common law must be strictly construed, it may well be asked, how can a statute which authorizes a wife to hold "separate" property and conduct a "separate" business, and which only gives to her the earnings from labor performed "on her sole and separate" account, be so construed as to authorize her to hold property jointly

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with her husband, carry on with him a joint business, and give to her earnings of labor which was performed on the joint account of both? The question carries with it its own answer. Very clearly the legislature of this state has not authorized and does not contemplate a business partnership between the two. To repeat the exact language of judge EARL in *Coleman agt. Burr et al.* (93 N. Y., 17, 25), before quoted: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each as to the other remain as they were at common law." This explicit utterance answers the question propounded and is decisive of this case. The claim of the plaintiff is that these statutes go much further, that they cover and include a partnership between husband and wife, and relate to their joint property and business, and to the labor which she may perform on their joint account. The court of appeals, however, explicitly declares that they do not, that they touch a married woman in her relations to her husband only so far as they relate to her separate property and business and the labor she may perform on her sole and separate account, while in all "other respects, the duties and responsibilities of each to the other remain as they were at common law." It is needless to add that if the relations between husband and wife are only changed so as to allow her to own a "separate" property and conduct a "separate" business, and to receive the earnings from such "separate property and business," and from "the labor she may perform on her sole and separate account," then a partnership between the two cannot exist, for in such a case the property, business and labor must always be joint and not separate; and because joint and not separate, and therefore not covered by the statutes, the relations of husband and wife remain in regard thereto as at common law, which forbade a business partnership between them.

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Upon the trial of this cause at the circuit the counsel for the plaintiff relied upon the case of *Zimmerman agt. Erhard and Dodge* (58 *How.*, 11) in the New York common pleas, which was then followed by the court not, however, without grave doubts then expressed as to its soundness, and which doubts have by subsequent examination and reflection been developed into a clear judgment, that the opinion of BEACH, J., in that case cannot be sustained and should not be followed. It was an action brought by a husband and wife for goods sold by them as partners to the defendants. The sole defense was that the action could not be maintained by the two, because the relation of partners could not exist between them. The opinion referred to is to the effect that husband and wife may legally form a business partnership, but while the result therefrom (an affirmance of a judgment rendered for the plaintiffs in the court below) was concurred in by the other two judges (VAN BRUNT and LARREMORE), yet they were careful so to state and assign other reasons for such concurrence. The premise upon which judge BEACH predicates his reasoning and conclusion is erroneous. Referring to *Adams agt. Curtis* (4 *Lans.*, 164) he quotes therefrom as follows: "The effect and intent of the act (*Laws of 1880, chap. 90*) is to remove all disabilities of coverture, so as to enable her to sue and be sued as to contracts, in all respects as though she was in fact unmarried." This, as a legal proposition, has been overruled by the court of appeals in the cases hereinbefore cited (*Bertles agt. Nunan*, 92 *N. Y.*, 152; *Coleman agt. Burr et al.*, 93 *N. Y.*, 17), and therefore all reasoning based upon it must be equally unsound. "All the disabilities of coverture" have not been removed. The legislation of this state has only authorized her to own "separate" property, conduct a "separate" business and receive wages for services rendered upon "her sole and separate account." As to a joint property, joint business and joint labor, her relations to her husband remain as at common law. In this present *status* of the law is also to be found the answer to a further argu-

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ment of judge BEACH, that as the wife can employ the husband as an agent to conduct her separate business, therefore she may join the husband as a partner in business, as a partnership "is founded upon agency." The error in the reasoning consists in not bearing in mind the fact that he was arguing in regard to the ability of a person to contract, who had no general power in that particular — one who could only make such contracts and agreements as express statute law clearly authorized. That person — a married woman — was authorized to own a "separate" property and to conduct a "separate" business, and was therefore empowered to employ an agent in its management or conduct. The agency maintained and perpetuated the separateness of the property and business, and was therefore not incompatible with the statute. When, however, the question relates to the formation of a partnership, the problem to be solved is not, what ought a wife to be authorized to do further than is expressly permitted, because the legislation already had is based upon a certain principle which logically should be carried further; but it is, what does the language of the act expressly permit? Perhaps the law as it is should be carried farther, and allow a partnership between husband and wife. The propriety of such a thing is for the legislature and not for the courts. The former may, perhaps, change the common-law rights of husband and wife, the latter cannot. They can decide that when the wife is authorized to carry on a "separate" business and own a "separate" property, she may employ an agent for that purpose, but they are as powerless to carry the principle involved in the legislation which conferred upon the wife power to own and conduct a "separate" business and property to the case of a joint business and property as they would have been to alter and change the common law in the particular which forbade that which the statute now permits. Innovations upon the common law are for those in whom the power to legislate is vested. What further should be done, because of what has been done, is for them. The courts declare what the

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law is, and whilst upholding and enforcing all legal legislative enactments, they must abide by the common law as it is, and not change its unrepealed forbiddings under the specious plea that they only carry out the spirit of an enactment. It is proper sometimes in constructing a statute to look at its spirit, but that principle does not authorize courts, when they can see that a certain reason has led to the enactment of a statute changing in some one particular the common law, still further in other particulars to alter and abrogate it. As the power to change or repeal is with the legislature, the rule of construction is that the statute was designed to go just so far, and no farther than its plain words declare. Least of all can it be assumed that legislation designed to separate the property of the wife from that of the husband, and to use it in a "separate" business, allows her to mingle her property with his, and to subject through a partnership with him to his control, his management and his contracts.

The conclusion of judge BEACH in the case referred to is at variance with that of SEDGWICK, J., in *Chamboret* agt. *Cagney* (35 *N. Y. Sup. Ct. R.*, 474, 487, 488) and those of the courts in two other states. In Massachusetts, which has a statute containing a provision substantially identical with ours, it has been held in several cases (*Lord* agt. *Parker*, 3 *Allen*, 127; *Plummer* agt. *Lord*, 5 *Allen*, 460, and 7 *Allen*, 481; *Knowles* agt. *Hull*, 99 *Mass.*, 562) that husband and wife cannot become partners in business. The reasoning of the court in these cases, and especially in the one first cited (3 *Allen*, 127; see pages 129 – 130) is well worthy of attention. The Massachusetts cases have also been recently followed in Indiana (*Haas et al.* agt. *Shaw et ux.*, 91 *Ind.*, 384; *Scarlett* agt. *Snodgrass*, 92 *Ind.*, 262), and in that state also a statute contains a provision very similar to ours. These authorities are of too high a character to be disregarded, and should certainly be followed by a trial judge in this state, when the reasoning by which they are supported commends itself to his judgment, and is in harmony with that of our own court of appeals.

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It may, however, be said that the decisions referred to go beyond the present case and forbid a partnership between a married woman and a person not a husband. This is conceded; and it is yet an unsettled legal problem in this state whether or not any partnership of a married woman, previous to chapter 381 of the Laws of 1884 becoming a legal enactment, which removes all the disabilities of a married woman to make contracts, but does not "apply to any contract that shall be made between husband and wife," would be valid.

There are cases decided which seem to imply that such a thing is possible in this state, and there are others which imply a contrary doctrine. That question is not now determined. Certain it is that the words "separate" and "sole and separate," used in our statute in connection with the property, business and labor of the wife, must have some meaning. If they do not forbid a partnership in property, business or labor with all persons, because not permitting her to engage in a joint venture with any one, then they must refer to property, business and labor "separate" from the husband, held, carried on and performed on "her sole and separate account," as distinguished from that in which he is interested. Without this construction, at least, of the words, they are meaningless; and with it the impossibility of the soundness of the position assumed by plaintiff only becomes the more apparent.

This opinion might, perhaps, well stop here, but I cannot forbear to allude to another argument based upon direct adjudications of the court of appeals. A valid agreement of partnership can only be made between individuals who are independent persons, and neither owing any duty to the other in regard to such business which shall make the enforcement of the partnership agreement impossible. Is this theory of mutual independence applicable to a wife who is about to embark in a business venture with her husband? In that business the husband, at least, is interested, and it is exceedingly difficult to determine what the wife owes to him as a

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duty in connection therewith, from which duty no agreement can absolve her and no partnership contract change. In *Coleman* agt. *Burr* (93 *N. Y.*, 17), the case before referred to, it was held that the promise of the husband to compensate the wife for services rendered to a member of his family, and which services were confessedly meritorious, could not be enforced for the reason that the wife, because she was a wife, owed these services to the husband. In *Whittaker* agt. *Whittaker* (52 *N. Y.*, 368), it was decided that a note given by a deceased husband to a wife for services, a part of which was "out of door work on her husband's farm, could not be enforced against his estate." If the husband is unable to make a valid promise to pay the wife for services rendered to him, and which in one case were not household duties, upon what principle can a promise to give to her one-half of the profits, or any other proportion of the profits, of *his* business, as a compensation for her services, be upheld? If the two can become partners, the husband who owns a business and has furnished its capital can, under pretense of compensating the wife for services rendered to him therein, make her his partner, and divide with her its profits, though such help may be as occasional and exceptional as that of the wife upon the farm in one of the cases above referred to. It is this inability of the wife to contract with the husband in regard to her services, which forms, and ever must form, so long as the wife owes duties of service to the husband, a barrier to a business partnership between them. That relation, as has been before stated, can only exist when the parties to it are free to form such agreements as to its profits as they may elect to make. This is vital to a partnership agreement, and the duty of service to the husband would oftentimes make his agreement with her incapable of enforcement. It is true we can conceive of bald instances of services which the wife would not be bound to render; but it is impossible to mark with accuracy the line where her duties as the husband's helpmate terminate. The pursuits and ventures

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of life are so numerous and variant, and the circumstances and conditions of married life so different, that it is impossible to lay down a rule which shall define the wife's duty of service with precision; and because it cannot be done, there can be no general power to form partnerships between husband and wife, which must cover every enterprise and venture of life, which are as various as the tastes and inclinations of parties and their situations and conditions in the world. If a partnership can exist between husband and wife in the mercantile business, it can in farming or in any other. It may begin with the marriage relation, follow it in every enterprise, and terminate only with the life of one or both parties. This radical change of the *status* of married persons, subverting in fact the whole social fabric, cannot be legally effected for the reason before stated, that as the husband is unable to make a legal contract to compensate the wife for services rendered to him in and about his business, he cannot form a partnership with her, which necessarily must, in very many cases at least, involve a promise to pay for services to which he is legally entitled as husband.

Perhaps the argument to show that husband and wife cannot become business partners is already complete, but two other points are entitled to some attention. First. By section 8 of the act of 1860 (the one which it is claimed gives the power), it is declared "no bargain or contract entered into by any married woman in or about the carrying on of any trade or business under the statutes of this state, shall be binding upon her husband, or render him or his property in any way liable therefor." It can hardly be supposed, that if the legislature supposed it had under the act, of which the provision just quoted forms a part, allowed a partnership between husband and wife, it would have inserted that clause in its present form, without any exception in favor of contracts made by the wife in regard to a business in which the husband was her partner. Second. While chapter 381 of the Laws of 1884, has removed in general all disabilities of a married woman to

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contract, in its second section it has been carefully said: "This act shall not affect nor apply to any contract that shall be made between husband and wife." This section is certainly significant of legislative intent. If the aim and effect of past legislation were to remove "all the disabilities of coverture," as judge BEACH assumed in *Zimmerman* agt. *Erhard and Dodge*, why was the act of 1884 passed, and why were contracts between husband and wife excepted from its operation? The passage of that statute is a legislative declaration that the wife did yet labor under some of the disabilities of coverture in the making of contracts, and that as to the husband these disabilities should still be maintained.

Having reached the conclusion that husband and wife cannot be partners in business, and that no contract made by the latter in regard to such business is enforceable against her, it is scarcely necessary to add, that any declaration by the wife to the effect that she sustained that relation to her husband is not binding upon her. In the making of contracts all parties thereto are assumed to know the law. If the wife had made the direct statement that she was the partner of her husband, the plaintiff had no right to be deceived by it (*Brewster* agt. *Striker*, 2 N. Y., 19). It is somewhat questionable whether or not the evidence of the plaintiff, if found to be true, necessarily justified the legal inference that the wife thereby intended to assert the existence of a legal business partnership with the husband. Her declaration, if made, to the effect that she was equally interested in the business with her husband, was capable of another explanation, and perhaps it was erroneous to assume, as the court did in its charge, that if the jury found that such statement was made, they should find for the plaintiff. It would, perhaps, have been more accurate if the jury had been directed to find whether or not the defendant had thereby intended to assert that she was a partner in the business for which the money was loaned, and was so understood by the plaintiff to assert. Of that error, however, the plaintiff cannot complain. The case was sub-

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mitted to the jury in the aspect most favorable to her. If, therefore, that which the plaintiff claimed the language evidenced could not legally exist, the plaintiff was not entitled to a verdict.

It is proper to state, in conclusion, that if any doubt existed in my mind in regard to the question discussed, the motion for a new trial would be denied. Careful study of such question has, however, brought me to the clear conviction that the plaintiff was not entitled to recover against the wife, and that therefore a new trial should be granted.

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### N. Y. CITY COURT.

JOHN W. STEPHENSON agt. WILLIAM J. HANSON.

In the Matter of the Application of WILLIAM J. HANSON  
agt. JOHN KOLTER, a surety.

*Surety on an undertaking on which order of arrest was granted — Power of court to punish surety for false swearing as to his property — Code of Civil Procedure, section 2285.*

A surety on an undertaking on which an order of arrest was granted, who swears falsely as to his pecuniary responsibility, is guilty of perjury, which is a contempt of court, and the court is empowered to punish that offense by imposing a fine sufficient to indemnify the defendant for the loss and injury he has sustained through the surety's misconduct, and by imprisoning him for six months, and until the fine is paid.

*Special Term, June, 1884.*

MOTION to punish the surety for contempt in swearing falsely as to his pecuniary responsibility.

Kolter was a surety upon an undertaking, on which an order of arrest was granted, in a certain action in which this applicant was the defendant and one Stephenson the plaintiff; the order of arrest therein was vacated. Judgment was subsequently recovered by Hanson against the surety Kolter, for

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the sum of \$281.65, damages and costs, sustained by reason of his arrest.

In that action the defendant was examined as to his property, upon the return of execution wholly unsatisfied, and upon the facts disclosed this motion is made.

HYATT, J. — It is conceded that on June 9, 1883, the surety Kolter signed an undertaking, in the usual form, as surety upon an order of arrest in the action of *Stephenson* agt. *Hanson*; Hanson alleges that he also justified, by swearing that he was worth \$500 over and above all his debts and liabilities; the surety deposes, upon his examination as a judgment debtor in the action of *Hanson* agt. *Kolter*, that although he signed and executed the instrument "he did not go before any notary upon that bond, and did not swear to the affidavit therein; that he signed his name and went away without reading the document;" but even if this statement is true, he at the same time deposed that in the same action "he signed a second undertaking, marked filed July 20, 1883; that he signed the affidavit of justification therein, in the office of a lawyer and notary public, without reading or having it read to him, and supposes that he must have sworn to that affidavit before the notary public; that he has been watchman and housekeeper since May, 1884, and prior to that time was a repairer of billiard tables; that he is married and supports a family; that he is not and was not prior to June 6, 1884 (date of the order for his examination as a judgment debtor), worth anything or possessed of any property, real or personal, or of any nature whatsoever, except household furniture exempt from execution; that he has no money except five dollars in the bank, and has had no other money in the bank for over a year last past."

He further deposes positively: "I have been in no better position pecuniarily, during more than a year last past, except that I acquired in the spring of 1883 a contingent interest in two second-hand billiard tables, with another, paying sixty

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dollars apiece, share and share alike, as part owner. In October, 1883, I was paid seventy-five dollars for my interest; we advertised them for sale and was not offered any price for them, but think we could sell them for about \$175 apiece; I desire to state nothing to my foregoing testimony."

The examination was subscribed and sworn to, after having been read to him, by the same judgment debtor, June 9, 1884. Upon the 17th of June, 1884, his examination was continued. He then deposed as follows: "Upon my former examination I was not represented by counsel as I am now; I reside at 111 Fifth avenue, New York city; I am watchman and housekeeper at that place for August Belmont; I have been with him as watchman fourteen years; when I was examined before I thought that reference was only made to my property in this city when asked about my property; I own three lots of ground in Cook county, Illinois, near Chicago; I got them from Thomas Back, to whom I loaned \$100; I produce the deed he gave me; he has never paid any part of the loan; the date of the loan was February 23, 1878; he was to return it March 23, 1878; I have paid taxes ever since; it is free and clear of incumbrances; in the year 1878 those lots were worth \$1,300, and they have increased in value since; I have seen Mr. Back since; he said he had no money; could not pay me, and was sorry, that I could keep the lots; that his wife was dead and he never could pay me; the billiard tables are worth \$250 apiece; I did not read the undertakings when I signed them; they were not explained to me, and I did not know what they were; when I signed the undertakings I considered myself worth double the amount therein mentioned, and do so now."

Upon his cross-examination he testified: "I knew I was signing undertakings; naturally enough I knew when I signed them I must be worth some hundreds of dollars; I was born in New York city; went to primary school, also night school; I can read; I have taken no proceedings to perfect title under the deed; I don't know where the grantor is; have not seen

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him for a year last past; I paid taxes all along; the yearly taxes are two dollars and some cents; never saw the lots; my idea of their value is derived from the consideration stated in Cummings' deed to Back; I don't know whether the lots are improved or not, nor how far they are from Chicago; I have heard that their value was more than \$1,300."

After a careful examination of Kolter's testimony as thus fully set forth, I cannot reconcile its many inconsistencies of statement, and fail to find either excuse or justification for the positive contradiction of facts sworn to by the judgment-debtor upon his first examination.

Kolter is an intelligent man; has had some schooling; his occupation calls for the possession of judgment and the exercise of shrewdness; it would naturally surround him by associations tending to increase, rather than to diminish, those faculties, and certainly, in some degree, to impress him with a sense of responsibility for his acts, he knew what an undertaking was and the obligation it imposed; that on each occasion he had signed the undertaking, and upon one at least the affidavit of justification; he claims he did not swear to the first, but supposes he did to the second, before the notary present, yet, upon his direct-examination, June 17, 1884, he swore: "I did not read the undertakings when I signed them, and did not know what I was signing;" and then upon his cross-examination he swore "that it entered into his mind what he was worth at the time he signed, because he then knew he was signing undertakings, and that naturally enough he knew when he signed he must be worth hundreds of dollars.

On the first examination it appears that his occupation as night watchman and housekeeper commenced May, 1884, and that he had not owned any property within a year except a half interest in two second-hand billiard tables, for which he accepted seventy-five dollars, although he thought they could be sold for \$175 apiece, notwithstanding they had been advertised and no offer received for them.

On his second examination he testified that his occupation,

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as formerly sworn to, had existed for the past fourteen years, and that the said tables were worth \$250 apiece.

The judgment debtor's explanation of his contradictory statements, made at the two examinations, is insufficient, and, under all the circumstances, incredible. I cannot believe that on his first examination he was puzzled or thought that the examining counsel referred only to property in the city. When asked as to his real and personal property, he positively stated that he was not worth anything or possessed of real or personal property of any nature whatsoever, except what he expressly claimed was exempt from execution (household furniture); that he had been in no better position (June 9, 1884) for more than a year last past, nor within that time owned or been possessed of any other property except the billiard tables. It is probable that it occurred to the mind of the judgment debtor that on the 19th of July, 1883, he had executed an undertaking upon an order of arrest, and had sworn to the affidavit of justification annexed thereto, to the effect that he was worth \$500 over and above all his debts and liabilities; whereupon, at the second examination, he admitted the ownership of the three lots of ground in Illinois, conveyed, together with a gold watch, by one Back and wife to secure a loan from him to them of \$100, February 23, 1878, and that the loan had never been paid; that he had seen Back a year ago, who told him that he could not pay and that he could keep the lots; he then further testified that he had never seen the lots; that he knew little or nothing about them, and had heard that they were worth more than \$1,300.

The most plausible inference that can be drawn from that statement is, that when the judgment debtor swore that he had no property, he believed the lots to be without any value; and in view of their abandonment, together with the gold watch, and of the entire absence of proof of any value, I shall consider their value at \$100.

My judgment, therefore, based upon all the facts before

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Stephenson agt. Hanson.

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me, leads to the conclusion that when the surety executed the undertaking he was possessed of five dollars in the Bowery Savings Bank, an interest in two billiard tables of the value of seventy-five dollars, and three lots in Illinois of the value of \$100, property amounting in all to \$180, and that the affidavit of justification attached to the said undertaking, sworn to July 19, 1883, was false.

So long as the law of this state provides for arrest in civil proceedings, its requirements should be enforced with literal exactness. The defendant Hanson was entitled to two sufficient sureties, as provided in section 559, Code of Civil Procedure, and he would not have been arrested and held to bail if Kolter had not acted as surety and falsely sworn that he was worth the sum in which he justified.

It is no slight matter to deprive a person of his liberty and cause, or aid in causing, his imprisonment, without due process of law; yet this surety seems to have regarded his performance as a most trivial one, and frankly testifies, seemingly as an adequate apology, "that he went on the undertaking as a matter of friendship for Mr. Stephenson, and received not one dollar for it."

It is to be regretted that he is not alone in his flimsy view of the law, and that he has so large a following of others who regard the act of becoming a surety as simply perfunctory, and not one of the necessary safeguards against the possible, and too frequent, abuses and perversions of the provisional remedy of arrest in civil actions.

The surety was guilty of perjury, which is a contempt of court (*Stackhouse agt. French*, 1 *Bing.*, 365).

Section 2285, Code of Civil Procedure, empowers the court to punish that offense by imposing a fine sufficient to indemnify the defendant for the loss and injury he has sustained through the surety's misconduct, and by imprisoning him for six months and until the fine is paid. The power to punish for contempt is a branch of the common law, adopted and sanctioned by the constitution of this state (*Yates agt. Lans-*

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Zabriskie agt. Wilder.

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ing, 9 *Johns.*, 416; *Eagan* agt. *Lynch*, 3 *Civil Pro. R.*, 236).

The language of the undertaking fixes the maturity of the surety's obligation upon the date of the order (May 6, 1884) *finally vacating the arrest*. The fact that the plaintiff has appealed from the judgment in the original action, is therefore not material.

It is urged that the surety did not willfully and knowingly mislead the court, and intentionally swear falsely; if so, I will extend to him the benefit of the doubt, and will not inflict the punishment of six months' imprisonment, as for a criminal contempt. The power and duty of the court is to redress the wrong of the injured party; it can make no difference to him whether the contempt was designedly or negligently committed, his loss is the same in either event.

The actual loss occasioned by the wrongful act of the surety Kolter is the amount of the judgment recovered against him by Hanson, in the action upon the undertaking, to wit, \$281.65, with interest, and fifty dollars allowed as reasonable counsel fee for the legal services required in the proceedings.

The surety is fined that amount and his commitment is directed until the fine is paid.

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## N. Y. COMMON PLEAS.

NELSON ZABRISKIE agt. EDWARD P. WILDER.

*District court justices — Practice as to amended or supplemental returns.*

Although it seems there is no doubt that the court of common pleas may of its own motion, order an amended or supplemental return, nor is there any doubt that a justice of the district court may himself apply for leave to amend or to supplement his return, yet it is the safe practice to require the justice to so apply before he alters or adds to his first return.

*Special Term, July, 1884.*

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Zabriskie agt. Wilder.

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VAN HOESSEN, J.—In *Wait's Practice* (vol. 4, p. 449) will be found a form for an additional return voluntarily made by a justice. There is no doubt that this court may, of its own motion, order an amended or a supplemental return, nor is there any doubt that a justice of a district court may himself apply for leave to amend or to supplement his return (*Simpson* agt. *Carter*, 5 *Johns.*, 350). There is more question as to whether or not a justice may, without obtaining permission of the appellate court, volunteer to make an amended or a supplemental return.

In *Barker* agt. *Webster* the general term of the superior court of Buffalo decided that, without leave of the appellate court, a justice had no right to file an amendment or addition to his original return; but the old supreme court, in *Rudd* agt. *Baker* (7 *Johns.*, 548) impliedly sanction the making of supplementary returns. They speak of the practice without disapproval, though they strongly reprehend the conduct of the justice in that particular case, because he was so extremely amiable that he made a fresh supplementary return whenever either of the parties called upon him, though he did not think it necessary to make his numerous returns at all consistent.

My own judgment is that it is the safer practice to require the justice to apply for leave before he alters or adds to his first return. Notice may then be given to both litigants, and neither party will be surprised, when the case comes on for argument, at finding that the justice has changed the papers on which the appeal is to be heard. I will therefore direct the amended return to be taken from the files, but as the question raised is not without difficulty, and as there is a decision of high authority that permits the filing of a supplementary return, I will impose no costs.

There is no need of an amended return. The appellant's remedy is under section 3049. The return need not contain proof of service of the notice of appeal upon the respondent.

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Matter of Bogart.

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## SURROGATE'S COURT.

In the Matter of the Probate of the Last Will and Testament  
of WILLIAM S. BOGART, deceased.

*Will — Evidence of due execution — Subscribing witnesses need not subscribe  
in each other's presence.*

Where the evidence showed that deceased signed the paper propounded, and acknowledged the signature to be his, declared the instrument to be his last will and testament, and requested the witness G. to become a witness thereto; that subsequently he requested the witness F. to sign "as a witness," but, according to his testimony, without either acknowledging the signature or declaring it to be his will; the testator is shown to be familiar with the requisite formalities attending the execution of a will; the attestation clause being faulty in that it omits to state that the witness signed at the request of the testator:

*Held*, that it is not necessary for the subscribing witnesses to a will to subscribe as witnesses in each other's presence.

The testimony of a subscribing witness who signed the will in the presence of the testator alone, is not conclusive on the question of due execution, when it appears that it is to his interest that the will should be set aside. Under such circumstances, where the other testimony is favorable to due execution, and it is shown that the testator knew the contents of his will, and knew the formalities required for due execution, and there is an attestation clause alleging due publication, the will may be admitted to probate.

*Kings county, March, 1884.*

*Rufus T. Griggs and M. J. McKenna*, for executor and proponent.

*Eastman & Garretson and Scovill & De Witt*, for contestants.

BERGEN, S. — The evidence in these proceedings shows the deceased signed the paper propounded, and acknowledged the signature to be his, declared the instrument to be his last will and testament, and requested the witness Gray to become a witness thereto; that subsequently he requested the witness

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Matter of Bogart.

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Fowler to sign "as a witness," but according to his testimony, without either acknowledging the signature or declaring it to be his will.

The question before me is whether the instrument has been sufficiently proved to authorize its being admitted to probate. The statute provides that the testator shall sign in the presence of the witnesses, or acknowledge the signature to be his, and declare the instrument to be his last will and testament. The attestation clause is faulty in that it omits to state that the witnesses signed at the request of the testator. Now, in view of this, is it competent for this court to admit the paper to probate? The testator is shown to be familiar with the requisite formalities attending the execution of a will, for they were observed at the time Mr. Gray became a witness, as testified to by him, and this was previous to Fowler becoming a witness.

"The result of the authorities upon the probate of wills is that the question of the due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case, and that no controlling effect is to be given to the testimony of the subscribing witnesses" (*Orser* agt. *Orser*, 24 *N. Y.*, 52). And if the person executing the will is shown to be familiar with the law upon the subject, the presumption that the formalities have been observed is very strong, and should the testimony of a subscribing witness amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integrity and intelligence of the witness, and the circumstances surrounding the particular case (*Orser* agt. *Orser*, 24 *N. Y.*, 53, 54).

Fowler's testimony should be carefully scrutinized. He is an interested party; the manner of giving and its matter are such as to lead me to conclude that he cannot in this matter be relied upon. The maxim "*falsus in uno, falsus in omnibus*," applies with unusual force. He is a party to these proceedings, and, though a man of more than ordinary intelligence, says he does not know whether or not he is interested,

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Matter of Bogart.

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or whether he will be benefited by the instrument being rejected — a statement unworthy of credence. There are other portions equally improbable and unworthy of belief. I therefore do not think it should be considered in determining the question. When a party in a civil action deliberately swears false to one material part of his testimony, and the jury are satisfied that he has so sworn false — intentionally false — they are not only at liberty, but it is sometimes the duty of the jury, to reject the whole. The maxim is "*falsus in uno, falsus in omnibus*" (*Moett agt. People, &c.*, 85 N. Y., 373).

Though undoubtedly the general rule is that an uncontradicted witness must be believed, it is subject to the qualification that when his testimony is improbable, he is interested, or where he is impeached, the court or jury is not bound blindly to adopt his testimony as true (*Elwood agt. The Western Union Telegraph Co.*, 45 N. Y., 553; *Gildersleeve agt. Landon*, 73 N. Y., 609; *Moett agt. People, &c.*, *supra*; *McNulty agt. Hand*, 86 N. Y., 546). In *Orser agt. Orser (supra)* there was an attestation clause, one witness was dead, and the other testified to facts which negatived the contention that the proper formalities had been observed, yet the court said the jury were at liberty to find the proper execution of the instrument. It is true that there was a full attestation clause, and therefore the question remains, whether or not there is a presumption from the circumstances.

The attestation clause is sufficient as a declaration that it is his will, and the sole question is whether or not I can conclude there was an acknowledgment of his signature. Even under *Mitchell agt. Mitchell* (77 N. Y., 596; S. C., 26 Hun, 97), an acknowledgment was here proved. When Fowler was requested to become a witness, the signature of the deceased was, he said, in full view. That circumstance was there conceded by the court to be sufficient. The case was distinguished from *Baskin agt. Baskin* (48 Barb., 200), affirmed in court of appeals, where that was held a sufficient acknowledgment under the statute.

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Matter of Bogart.

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In *Hands* agt. *James* (*Comyne*, 531) the court said: "An attestation clause is not required by the statute, and whether inserted or not, it must be proved. If inserted it does not conclude, but it may be proved *contra*, and the verdict may find *contra*; then if not conclusive when inserted the omission does not conclude it was not so, and therefore must be proved by the best proof which the nature of the thing will admit."

Again, in *Croft* agt. *Pawlet* (2 *Strange*, 1109) the attestation clause was defective in that it did not state a signing in the presence of the testator. The court held it was evidence to be left to a jury of a compliance with all the circumstances, and a verdict was given for the will.

In *Brice* agt. *Smith* (*Willes*, 1) the witnesses were both dead, and the attestation clause was defective in not stating that the instrument had been signed by the witness in the presence of the testator. The court held the will was well founded, relying upon *Hands* agt. *James* (*supra*). Chancellor WALWORTH, in *Chaffee* agt. *Baptist Missionary Convention* (10 *Paige's Ch.*, 90), says: "Indeed it has been decided that a formality of this kind, not noticed in the attestation clause, may even be presumed from circumstances after the witnesses to the will are dead," citing *Croft* agt. *Pawlet* (*supra*); *Brice* agt. *Smith* (*supra*); and *Hands* agt. *James* (*supra*).

The circumstances here relied upon are that the testator was familiar with the requisite formalities (*Orser* agt. *Orser*, *supra*); knew its contents and character (*Gilbert* agt. *Know et al.*, 52 *N. Y.*, 125); the will was in the handwriting of the testator. Since January 1, 1838, when the present English statute of wills took effect, the courts have had to consider the question now before me. I do not apprehend there is any difference in the force of an attestation clause under their law from that under ours. It is true their statute declares no formal attestation necessary, a declaration which coincides with the construction of our own legislation upon the subject. Their statute, as ours, prescribes certain formalities, and any presumption that is available in their courts can be in-

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Matter of Bogart.

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in by us. *In re Seagram* (3 *Notes of Cases*, 436) there was no attestation clause; the will was admitted though the witnesses were dead. The same in *In re Johnson* (2 *Carters*, 34). The same in *In re Luffman* (5 *Notes of Cases*, 183), where the attestation clause was defective and the whereabouts of the witnesses unknown.

In *Leech et al. agt. Bates* (6 *Notes of Cases*, 699) two codicils purported to be signed by the testator and attested respectively by witnesses, the clause of attestation being imperfect, one witness deposed to facts, which, if true, would show that the statute had not been complied with, but circumstances proved that his recollection could not be relied upon. Held, as positive affirmative evidence was unnecessary, the presumption from the circumstances was that the proper formalities had been observed. And in *Wright agt. Rogers* (*L. R., Probate and Divorce* [vol. 1], 678) the same was held where one of the subscribing witnesses was dead and the other testified that the witnesses did not sign in the presence of the testator.

There is an additional question to be examined, and that is whether, in view of the circumstances that the witness Fowler was produced upon the part of the proponent, the rule applies that as he was presented as a credible witness the proponent cannot ask for a finding in opposition to his uncontradicted testimony.

Under section 2618 of the Code of Civil Procedure the proponent was bound to examine the witness to the will. He was competent to testify on direct examination (*Trustees of Auburn Seminary agt. Calhoun*, 25 *N. Y.*, 425), though not upon the part of the contestants, as to transactions with the deceased. Where the law obliges one to call a witness he may be impeached (1 *Greenleaf on Evidence*, 443), and a party is at liberty to contradict the testimony of his own witness, though indirectly he may be impeached thereby (*Idem*).

Here the testimony of this witness is not sufficient to overthrow the presumption arising from the circumstances.

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Haberstich agt. Fischer.

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I do not, therefore, think this forms any objection to the conclusion to which I have arrived, which is that the instrument was properly executed and should be admitted to probate.

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### SUPREME COURT.

ADAM HABERSTICH, appellant agt. FREDERICK L FISCHER,  
respondent.

*Practice as to moving a cause for trial — When party, other than the one who noticed it for trial, may move it — Code of Civil Procedure, section 977.*

Though under ordinary circumstances the party only who has noticed a cause for trial can move it for that purpose, yet when a cause has been specially set down for the day on which it was moved, and no objection was made to the right of the defendant to move it, and the plaintiff's counsel, after the jury was drawn, simply refused to proceed with the trial, the court was justified in directing a dismissal of the complaint.

*First Department, General Term, June, 1884.*

*Before DAVIS, P. J., and DANIELS, J.*

APPEAL from an order setting aside the dismissal of a complaint at the circuit, on the payment of the term fee, disbursements and costs of motion.

*Henry H. Morange, for appellant.*

*W. H. & D. M. Van Cott, for respondent.*

DANIELS, J.—The position taken by the counsel for the plaintiff, that the party only who has noticed a cause for trial can move it for that purpose, is under ordinary circumstances a correct statement of the law (*Code of Civil Procedure, sec. 977*). But this case differs in its controlling circumstances from those in which this legal proposition has been applied.

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It was first called for trial on Monday, the seventh of April, when it was announced to be ready by the plaintiff's counsel except that one of his witnesses was not then able to attend. For that reason the trial was postponed until the following Monday, when the cause was again called, and a person representing the plaintiff's counsel stated him to be unwell. It was then put over until the next day with a peremptory direction that it must then be tried. On that day this excuse was repeated and in like manner the case went over to the following day, with the announcement that in case the counsel's disability continued, other counsel must be engaged to try the cause on that day. The plaintiff's counsel was on that day in attendance at the court and applied for a further postponement of the trial. This was opposed by the defendant, who was ready to proceed, and a jury was directed to be impaneled. Up to this point no objection appears to have been made that the cause could not be moved for the want of notice from the defendant. But it had been at all times treated as entirely under the control of the court. There was no irregularity, therefore, in impanelling the jury, who were in readiness to hear the cause. The plaintiff's counsel was then directed to proceed, but declined to do so, and the complaint was thereupon dismissed.

This proceeding seems to have been entirely regular. The cause had been specially set down for the day on which it was moved, and no objection was taken to the right of the defendant to move it, and acting upon this apparent acquiescence in his right the jury was drawn. The cause was then regularly before them, and as long as the plaintiff's counsel, after that, simply refused to proceed with the trial the court was clearly justified in directing a dismissal of the complaint. It could as well be done then as it could if the plaintiff had endeavored to make out his right to recover by proof and had failed in doing so. The court would not, under such circumstances, be deprived of the power to dismiss the complaint because the defendant had not served notice of trial. The power was

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equally as complete over the action as soon as the jury had been impaneled and were in readiness to proceed with the trial.

Upon a motion to set aside the dismissal, the court ordered that to be done on the payment of the costs and disbursements of the term, together with the costs of the motion. This was as favorable a disposition as the plaintiff could reasonably expect, and the order should therefore be affirmed, with the usual costs and disbursements.

DAVIS, P. J., concurred.

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### N. Y. COMMON PLEAS.

WILLIAM H. RICKETTS agt. THE MAYOR, &C., OF NEW YORK.

*New York (city of) — Supreme court crier's salary not to be reduced by board of estimate and assessment — Consolidation act should be limited to future appointments.*

By chapter 296 of Laws of 1865, the justices of the supreme court for the first judicial department were authorized to appoint a crier of said court in the city and county of New York, and his compensation was to be fixed by the board of supervisors:

*Held*, that where, in pursuance of such authority, a crier was so appointed and his salary so fixed, the board of estimate and apportionment had no right, under the consolidation act (*Laws of 1882, chap. 410*), to reduce such salary during the term for which he was appointed. The consolidation act should be limited to future appointments made under its provisions without disturbing any rights which had vested prior to its enactment.

*General Term, June, 1884.*

*Before DALY, Ch. J., LARREMORE and BEACH, JJ.*

THIS action was brought by the plaintiff, whose salary as crier of the supreme court was reduced in December last by the board of estimate and apportionment, to have it adjudged whether such reduction was legal.

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Ricketts agt. The Mayor, &c., of New York.

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*John C. Shaw*, for plaintiff.

*David J. Dean*, assistant corporation counsel, for defendant.

LARREMORE, J. — By chapter 296 of the Laws of 1865, the justices of the supreme court for the first judicial department were authorized to appoint a crier of said court in the city and county of New York, and his compensation was to be fixed by the board of supervisors of said county. The justices, in pursuance of the authority thus conferred, appointed a crier whose annual salary was fixed by the board of supervisors at \$2,500. The plaintiff was duly appointed to fill a vacancy thereafter occurring in said office, and has since continued to discharge its duties. By the consolidation act (*chap. 410, Laws of 1882*) the act of 1865 is re-enacted, the board of estimate and apportionment being substituted for the board of supervisors (*Sec. 1116, Consolidation Act*). In December, 1883, the board of estimate and apportionment reduced and fixed the annual salary of said crier at \$1,500, and the comptroller of the city has, since January, 1884, refused to pay the plaintiff at any other rate. He is a public officer, and was appointed before the adoption of the consolidation act, which is clearly local in its character, and should be construed in harmony with article 3, section 18 of the Constitution of 1875, which prohibits legislative enactments in a private or local bill "creating, increasing or decreasing fees, per centages or allowances of public officers during the term for which said officers are elected or appointed." Under the ruling in *The People ex rel. Gass agt. Lee* (28 Hun, 469), and *Kerrigan agt. Force* (68 N. Y., 381), the harmony of construction is preserved which limits the consolidation act to future appointments made under its provisions, without disturbing any rights which had vested prior to its enactment.

The plaintiff is entitled to judgment in his favor.

DALY, C. J., and BEACH, J., concur.

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Kaufman agt. Lindner.

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## CITY COURT OF NEW YORK.

KAUFMAN KAUFMAN and ISAIAH KAUFMAN,. plaintiffs, agt.  
ISIDORE LINDNER, defendant.

*Code of Civil Procedure, section 1268 — When bankrupt not entitled to discharge of judgment under this section.*

Under section 5117 of the Revised Statutes of the United States, which provides that "no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy," those claims which have been incurred by any false representations or pretense of the bankrupt, or purchases made with the preconceived intent of not paying for them, are fraudulently contracted, and the debts thus arising are not discharged.

The nature of the action and character of the claim is not to be determined by the demand of the complaint, for the reason that prior to the amendment of 1879 (*adding subdivision 4 to section 549 of the Code of Civil Procedure*), the complaint should not contain the allegations of fraud; but when the affidavits upon which the order of arrest was granted discloses a claim incurred by the false representations of the bankrupt, it is not discharged by the proceedings in bankruptcy.

*Special Term, June, 1884.*

HYATT, J.—This is a motion by a judgment debtor claiming to have been discharged in bankruptcy from the debt on which the judgment in this action was recovered, for an order directing the clerk of this court to cancel and discharge the said judgment of record.

The motion is made under and pursuant to section 1268 of the Code of Civil Procedure, and the facts are as follows: The plaintiffs recovered judgment against the defendant May 21, 1874, for \$416.23, on a demand for goods sold and delivered and for money loaned by them to the defendant, which became due and payable before the 27th day of April, 1874. On said last mentioned day proceedings in bankruptcy were begun against the defendant, in which he is called "Israel" Lindner, and on May 9, 1874, he was duly adjudicated a bankrupt. On May 22, 1882, the defendant was discharged in

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bankruptcy under the name of "Israel" Lindner from the payment of all debts due from him on and before April 27, 1874, not excepted by section 5117 of the Revised Statutes of the United States.

An order of arrest was granted and the defendant arrested thereunder, as appears by the certificate of the sheriff of the service of the order, affidavits and summons; the defendant appeared in the action, but failed to answer or demur to the complaint.

The affidavits, upon which the order of arrest was granted, aver the purchase of goods by the defendant from the plaintiffs upon his representations that he had a valuable stock of jewelry in his store; that by reason of paying out large sums of money he was then short, but expected soon to pay all he owed plaintiffs; that he owed very little to any one else, and that his stock was all paid for except a few hundred dollars; they further aver that the plaintiffs believing and relying upon the representations of the defendant, sold and delivered to him a quantity of goods; that the said representations were false; that the defendant was wholly insolvent; that he did not pay either the plaintiffs or others to whom he was largely indebted, and that he had removed, concealed or secreted, the said stock from his store for the purpose of defrauding his creditors.

Section 5117 (*supra*) provides that "no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy." Claims usually comprised under this title, are those which have been incurred by any false representations or pretense of the bankrupt. Purchases made with the preconceived intent of not paying for them, are fraudulently contracted, and the debts thus arising are not discharged under this section (*Stewart agt. Emerson*, 8 *Benedict's R.*, 462).

The judgment in this action did not merge the alleged fraud; the court can, for the purposes of the bankruptcy statute, go behind the judgment, to see whether the claim upon which it was recovered was created by fraud (*In re Patterson*, 1 *Benedict's R.*, 307; *In re Whitehouse*, 4 *id.*, 63; *Warner*

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Merchants' National Bank of St. Paul agt. Southwick.

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agt. *Kronkhite*, 13 *id.*, 52). The defendant contends however that this action was upon contract, because the complaint, which was served after the granting of the order of arrest, was for a sum of money only, for goods sold and delivered and money loaned, and that the claim upon which the judgment was recovered, was therefore discharged by the operation of the defendant's discharge in bankruptcy.

The nature of the action and character of the claim is not to be determined in the case at bar, by the demand of the complaint, for the reason that prior to the amendment of 1879 (*adding sub. 4 to sec. 549, Code of Civil Pro.*) it had been well settled that in this class of cases the complaint should not contain the allegations of fraud.

In my judgment the affidavits, upon which the order of arrest was granted, disclose a claim incurred by the false representations of the bankrupt, which was not discharged by the proceedings in bankruptcy.

If I am right in my conclusion, it is unnecessary to consider whether the defendant is entitled to the benefit of a discharge granted to him in the name of "Israel" instead of Isidore.

The motion is denied, with ten dollars costs.

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SUPREME COURT.

MERCHANTS' NATIONAL BANK OF ST. PAUL agt. HENRY  
K. SOUTHWICK.

*Usury — Note drawn, dated, signed, delivered, made payable and first used in this state, but given for a precedent debt arising in another state—By what usury laws to be governed.*

A note drawn, dated, signed, delivered, made payable and first used in the state of New York, but given for a precedent debt arising in and owing to a resident of another state, is to be governed by the usury laws of New York, and not those of the other state.

*New York Circuit, August, 1884.*

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Merchants' National Bank of St. Paul agt. Southwick.

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MOTION by defendant for a new trial.

*L. B. Burmell*, for plaintiff.

*T. F. Wentworth*, for defendant.

VANN, *J.*— Upon the trial of this action it appeared that prior to March, 1882, the defendant had subscribed for stock of the Sioux Falls Water-Power Company, [a corporation organized under the laws of and carrying on its business in Dakota territory, to the amount of \$10,000, and that certain relatives of his had subscribed for a like amount. Fifty per cent only had been paid upon these subscriptions, when, in March, 1882, one Elwell, the president and treasurer of the company, came to New York, with authority to collect the remainder and demand from the defendant the balance of his subscription. The defendant at first denied his liability, but was finally “convinced that he was probably liable, and agreed that he would admit a debt of the even sum of \$10,000,” which was the amount of the principal unpaid upon the subscriptions of himself and relatives. He thereupon drew a note at six months for \$10,300, which included interest at six per cent, but Elwell refused to accept it, saying that he must have more interest than that. The defendant said that was the rate in this state, and then wrote another note, of which the following is a copy :

“\$10,350.

NEW YORK, *March 27, 1882.*

“Six months after date I promise to pay to the order of the Sioux Falls Water-Power Company, ten thousand three hundred and fifty dollars, at Hanover National Bank, New York, value received.

“H. K. SOUTHWICK.”

The defendant delivered this note to Elwell in the city of New York, together with the certificates of stock and an agreement, of which the following is a copy :

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"NEW YORK, *March 27*, 1882.

"Having this day borrowed of D. Elwell, treasurer of the Sioux Falls Water-Power Company, ten thousand dollars, and having given my note for said amount, with three hundred and fifty dollars interest added thereto, and having pledged the following certificates of the stocks of the said company, viz.:

Cert. Sp. 28, Royal K. Southwick, 25 shares.....	\$2,500
Cert. Sp. 26, H. K. Southwick, 100 shares .....	10,000
Cert. Sp. 29, Joseph H. Southwick, 25 shares.....	2,500
Cert. Sp. 27, Joshua Buffen, 50 shares.....	5,000

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"For the payment of said loan I hereby authorize and empower said D. Elwell, treasurer, to sell said certificate of stock to the highest bidder, at public or private sale, on failure to pay said note at maturity.

"H. K. SOUTHWICK."

The note was subsequently discounted by the plaintiff, a national banking corporation of the state of Minnesota, by the laws of which state, as well as of the territory of Dakota, interest at the rate of seven per cent is permitted. At the time of such discount the stock certificates and said agreement were delivered to the plaintiff.

This action was brought to recover the amount of said note, and the defendant answered, setting up the defense of usury. There was a verdict for the plaintiff, and the defendant now moves for a new trial upon the ground, among others, that on the undisputed facts the court should have directed a verdict for the defendant, as requested at the trial. The question is whether a note drawn, dated, signed, delivered, made payable and first used in the state of New York, but given for a precedent debt arising in and owing to a resident of Dakota territory, is to be governed by the usury laws of New York or Dakota.

In *Jewell* agt. *Wright* (30 *N. Y.*, 259), it was held that where an accommodation note, in which the rate of interest

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is not named, is dated, signed, delivered and made payable in this state, but has its inception by negotiation in another state, at a rate of interest usurious by the laws of this state, the laws of this state are to control as to the defense of usury.

In *Dickinson* agt. *Edwards* (77 N. Y., 573), the case of *Jewell* agt. *Wright* was held to be an authoritative precedent and well decided; and further, that where an accommodation note is made in this state by a resident thereof, bearing date here, by its terms payable within the state, with no rate of interest specified and no intention of the maker existing that it will be taken elsewhere for discount, if it is first negotiated in another state, at a rate of interest lawful there, but greater than that allowed by the usury laws here, it is void.

In each of these cases the instrument was an accommodation note that had no inception until it was discounted in another state, where a different law prevailed in relation to the rate of interest, and it did not appear that there was any intention on the part of the maker of the note that it should be first used without this state. In *Jewell* agt. *Wright*, DAVIES, J., dissented, and in *Dickinson* agt. *Edwards*, RAPALLO and DANFORTH, JJ., dissented.

In *Wayne County Savings Bank* agt. *Low* (81 N. Y., 566), it was held that the case of *Dickinson* agt. *Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this state, and that in the absence of such proof it must be governed by the law of the place of payment; and, further, that where, in performance on an agreement made in Pennsylvania, a note actually written in that state but dated and made payable in New York, was made for the express purpose of being used in renewal of another note of the same amount then held in Pennsylvania, and was forwarded by the holder to the maker, a resident of New York, and signed by him in that state and there mailed by him to the holder in Pennsylvania, together with a check for the discount at a rate lawful in that state, but unlawful in

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New York, was not usurious, upon the ground that it was executed to be held in Pennsylvania, the laws of that state must govern. All the judges concurred in this decision.

In *Tilden* agt. *Blair* (21 *Wall.*, 241), an accommodation draft, dated in Illinois, was by the acceptance made payable in New York, the place of residence of the acceptors, who, after accepting, returned the draft to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that state and this was in fact done. It was held that it was to be regarded as a contract made in the State where the draft was dated and drawn, and to be governed by the usury laws of that state. The controlling fact in this case was that the acceptors intended that the draft should be used or have its inception in Illinois.

These are the leading and most recent cases cited by counsel upon either side, and they seem to establish the following principles:

That commercial paper is to be governed by the laws of the state where it is made, if it is not by its terms payable elsewhere; but if by its terms it is to be paid in a state other than that in which it is made, the laws of the state in which it is by its terms to be paid must govern; except, in either case, where it is made to be first used in another state, the laws of that state must control.

Although in the case under consideration there was some evidence tending to show that the note in question was to be ultimately used without this state, still, the fact that it was intended to be first used in this state was not disputed. Not only was it drawn, dated, signed and made payable in New York, but it was also delivered and accepted in this state, and it was intended that it should be delivered and accepted when it was drawn. Both the actual and the contemplated inception were here. Its ultimate use is immaterial. It is the first use that controls. Had that been free from usury, no subsequent transfer could have been usurious. Even if it was given to pay a Dakota debt, or a debt governed by the laws of that

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territory, still, when the payee accepted the note it entered into a new contract, and submitted itself to the laws of the place where that contract was made, and impliedly assented to their action upon it (*Story's Conflict of Laws*, secs. 261, 363). Upon the delivery of the note to Elwell, as treasurer of the Water-Power Company, it became a completed contract and operative as commercial paper. The title to it was in the company. Nothing remained to be done to enable the company to maintain an action upon it when it became due. It took the place of the Dakota debt. A New York contract was by the voluntary action of the parties substituted for the Dakota contract. The laws of New York must therefore govern in its enforcement.

The motion for a new trial is granted, with costs to abide event.

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### N. Y. SUPERIOR COURT.

MARY CROSBY, respondent, agt. THE BOWERY SAVINGS BANK.

*Pleading — Complaint — Demurrer — Complaint in action by a person claiming to be the owner of money deposited in the name of another — When demurrer will be sustained.*

Where the complaint alleged the incorporation of the defendant under the laws of this state, and that on and between certain dates one Edward Hewitt deposited with the defendant, in his own name, the sum of \$718.28; that the sum of \$493.33, on account of said deposit so made, is still in the possession and custody of the defendant; that the plaintiff is, and was at the time above mentioned, the owner of the said money, and it was left for the benefit and in trust for the plaintiff; and that the plaintiff has duly demanded the return of said money, which return the defendant has refused to make. On demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action;

*Held*, that the demurrer should be sustained. The contract was made by, and with consent of the plaintiff. It does not appear that the defendant refuses to perform its contract, and until it does so appear there is no cause of action against the defendant.

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If there be no cause of action stated in the complaint, the defendant is under no obligation to bring in Hewitt, as provided by section 259 of the General Savings Bank act. That section applies to an action brought by the party in whose name the deposit was made when a claim to the deposit is made by another person.

*General Term, July 1884.*

*Before SEDGWICK, C. J., and TRUAX, J.*

THIS is an appeal from an interlocutory judgment (and order) overruling a demurrer to the complaint.

The complaint alleges the incorporation of the defendant under the laws of this state. It also alleges that on and between the 24th day of February, 1876, and the 28th day of January, 1881, one Edward Hewitt deposited with the defendant, in his own name, the sum of about \$718.23; that the sum of \$493.23, on account of said deposit so made, is still in the possession and custody of the defendant; that the plaintiff is, and was at the times above mentioned, the owner of the said money, and it was left for the benefit of and in trust for the plaintiff, and that the plaintiff has duly demanded the return of said money, which return the defendant has refused to make. Judgment is demanded for \$493.23.

The defendant demurred to this complaint on the ground that it does not state facts sufficient to constitute a cause of action.

*Carlisle Norwood, Jr., for appellant.*

*Abram Kling, for respondent.*

TRUAX, J. — The complaint shows no obligation on the part of the defendant to return the money deposited with it to the plaintiff. It does not show that the defendant knew that the money was the plaintiff's money, nor that it was left for the benefit of and in trust for the plaintiff. The inference to be drawn from the complaint is that the money was given to Hewitt by the plaintiff to be deposited with the

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defendant in Hewitt's name, and therefore it must be held that the plaintiff is bound by the contract which the defendant made with Hewitt, viz., that it would repay the money to Hewitt, the depositor, or to his legal representatives on demand, as required by the General Savings Bank act (*Laws of 1875, chap. 371, as amended by Laws 1882, chap. 409, sec. 257*).

The deposit became the property of the defendant, and the defendant became a debtor to the depositor (*Sims agt. Bond, 5 B. & Adol., 393; People agt. Merchants, &c., Bank, 92 N. Y., 7*). This contract was made by and with consent of the plaintiff. It does not appear that the defendant refuses to perform its contract, and until it does so appear there is no cause of action against the defendant.

In *Mulcahy agt. Develin et al.* (17 *Week. Dig.*, 308), cited by respondent, the complaint alleged that the plaintiff was the owner of and possessed of a certain sum of money on deposit with a third person, which sum of money in some way the defendant, without the plaintiff's knowledge or consent, became possessed of. The general term of the court of common pleas held that a demurrer to the complaint would not lie, because the defendants by demurring admitted that the plaintiff owned and was possessed of the money that the defendant had appropriated without her knowledge and consent. In this respect the two cases differ.

This action is to be distinguished from those actions in which it has been held that whenever one man has the money of another, which he ought to pay over, he is liable in an action of assumpsit. Here, as between the plaintiff and defendant, the defendant ought not to pay over the money to plaintiff, because with plaintiff's consent it has promised to pay to another (*See Stephens agt. Radcock, 3 Barn. & Adol. 354*).

Of course, if there be no cause of action stated in the complaint, the defendant is under no obligations to bring in Hewitt, as provided by section 259 of the General Savings

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Bank act. That section applies to an action brought by the party in whose name the deposit was made when a claim to the deposit is made by another person.

The judgment and order are reversed, with costs, and demurrer is sustained, with costs.

SEDGWICK, C. J. — I concur with judge TRUAX in his opinion that there is no legal cause of action, but think that there would be an equitable cause of action if Hewitt were made defendant with proper allegation.

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### N. Y. COMMON PLEAS.

JOHN BELL agt. JANE VANDERBILT, administratrix, &c., THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, impleaded with ALEXANDER R. FORDYCE and others.

*Mechanics' lien law — Amendments to — Extending its provisions to the erection of school-houses — Notice of claims may be filed with head of board of education.*

The amendments to the mechanics' lien law, extending its provisions to the erection of school-houses, embraces all contracts, whether they are with incorporated cities or not, provided the work was done or the materials furnished upon land the title to which was, at the time of the making of the contract and the passage of the act in any city, and a notice of claim which is filed with the head of the board of education, or of the school trustees of a ward, is a compliance with the requirement that it be filed with "the head of the department or bureau having the work in charge."

*General Term, July, 1884.*

*Before DALY, C. J., LARREMORE and BEACH, JJ.*

*D. J. Dean and T. M. Tyng, for respondent.*

*Joseph Fettretch and Julius Lipman, for appellants.*

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DALY, C. J. — It was held by this court in 1868, in *Brinkerhoff* agt. *The Board of Education* (2 *Daly*, 443), and affirmed by the court of appeals, that the mechanics' lien law did not apply to the erection of a school-house or of any building in the city of New York devoted to public uses, in consequence of which a statute was passed in 1878 to give a lien not upon the buildings but upon the moneys due or to grow due for the work done or materials furnished (*Laws of New York*, 1878, p. 403). This act applied where labor and materials were furnished in pursuance of a contract made with any incorporated city in this state. The lien was given upon the moneys in the control of this city due or to grow due under the contract, and the lien when filed became an absolute lien to the full value of the work done or materials furnished to the extent of the amount due or to grow due upon the contract.

This peculiar lien could be acquired by filing, within thirty days after the full work was completed and accepted, the notice of claim required by the act, with the head of the department or bureau having the work in charge, and with the financial officer of the city, which claim the financial officer was required to enter in a book called the lien book, but no such lien was binding unless an action was commenced within ninety days from filing of the notice, and the filing also with the financial officer of a notice of the pendency of such action.

This lien could be foreclosed by a judgment in the action directing the city to pay over to the respective claimants in the order of their priority as determined by the court, the sum found due them out of so much of the money as might be due from the city under the contract against which the lien was filed, which judgment could be enforced by execution.

Under this act it was held by the general term of this court, in 1879, in *Van Alstein* agt. *The Mayor, &c.*, that this act did not apply where the contract for the erection of a school house was made with the board of school trustees of a ward,

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the school trustees being a subordinate part of the board of education, which was not a department or bureau of the city government, but an independent body, separate and distinct from the corporation of the city of New York, which was charged with the performance of duties not legal or corporate, but relating and belonging to an administrative branch of the government of the state (*Ham agt. The Mayor, &c.*, 70 *N. Y.*, 459).

This decision was followed in 1881 by an amendment of the act of 1878, by which amendment another and final section was added to the act declaring that the act should apply to and include all cases and contracts under which work and materials had theretofore been or should thereafter be done and furnished upon any land, the title of which was at the time of making the contract, and at the time of the passage of the act in any city, and for the performance of which contract appropriations had theretofore or should thereafter be made and raised by any city, and that the act should apply to and include actions pending at the time of the passage of the act for work done and materials furnished under any such contract (*Laws of N. Y.*, 1881, *p.* 587, *chap.* 42).

Upon the present appeal it is necessary only to consider the cases of the plaintiff Bell, and the defendants Fordyce and Brown; for the defendant Low had lost any lien he may have had by his failure to commence an action within ninety days as required by the statute, and the remaining defendants have not appealed.

The notice for the creation of the lien was filed by the plaintiff Bell, and by the defendants Fordyce and Brown, in the year 1880, before the passage of the amendment above referred to, and therefore come within the provision of the amendment as cases where the work was done and the materials had been furnished before the passage of the act, and actions for which were then pending. The work was done in both cases under a contract made by the trustees of the public schools in the twelfth ward, for the mason work of a school

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house to be erected upon land owned by the city, and as this was not a contract made with an incorporated city under the act of 1878, but with a body that was a subordinate part of the board of education, there could be no recovery under that act when the actions were brought; and the question now presented is whether, having been so brought, the amended act of 1881 applies to them.

The first objection raised to their right of recovery is that the amendment of 1881 did not apply to the school trustees of the ward, but left the word "contract" to be defined by the act of 1878, which limits it to the class of contracts made with incorporated cities.

The referee rightfully overruled this objection, and held the amendment extended to all contracts, whether they were with incorporated cities or not, provided the work was done, or the materials furnished, upon land, the title to which was, at the time of the making of the contract and the passage of the act, in any city.

The next objection was that the notice was not filed with the head of a department or bureau having charge of the work, the complaint alleging that it was filed with the head of the board of education, or of the school trustees, which objection the referee sustained and dismissed the action, giving judgment for the city against the plaintiff and the defendants claiming liens.

His conclusion was that the board of education or board of school trustees was not a department or bureau having charge of the work as required by the act as amended, and this I think was erroneous.

If this construction is correct, no lien could be imposed upon any moneys payable under a contract for the erection of a school-house in the city and county of New York, for by the existing laws the board of education have charge of the erection of such structures; the money raised by taxation for that and other purposes connected with public education is deposited with the comptroller subject to the order of the board of education, and if that board is not a department or

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bureau, with the head of which the notice creating the lien can be filed within the meaning of the act of 1878, as amended in 1881, then there is no department or bureau with which such notice can be filed; which, I think, is not the meaning of the amendment.

The referee refers to the fact that the charter of 1873 was amended by inserting after the word "department" the words "and the board of education," as the charter now stands, which he regards as very like a legislative interpretation of the meaning of the term "department," but the question is not what may have been the legislative interpretation of the word "department" in the year 1873, but what the legislature meant when, in 1881, they added by amendment this additional provision to the act of 1877. They have by that amendment declared that the act shall apply to all contracts under which work has been done and materials furnished upon any land, the title of which was at the time of the making of the contract and of the enactment of the amendment in the city, for the performance of which appropriations are made and raised by any city. This intention must be carried out under the act as amended, and reading it as amended and as applied to contracts not made with incorporated cities, it must mean the body having charge of the work, whatever its name or title may be, or otherwise the object of the act as amended could not be fully carried out, for there is nothing to indicate that it was to extend to every other part of the state of New York except the city of New York. If the words in the original act had been "with the head of the department or bureau of the city having charge of the work," there might have been more difficulty in the construction; but as the words are simply "the head of the department or bureau having charge of the work," the body having, under existing laws, the charge of erecting school-houses must be the department or bureau within the meaning of the amended act, in which, or rather with the head of which, the notice is to be filed, and that body in this city is the board of education.

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It was held in the court of appeals in *Hubbell* agt. *Schreyer* (15 *Abb. Pr. R.*, 300) upon the review of a judgment of this court, "that the mechanics' lien law is a remedial statute as furnishing a summary remedy for the recovery of the claims provided for, and that while it is to be strictly construed so far as to require substantial compliance with every material provision by which the property of a third person may be incumbered by the mere act of the claimant and a cloud put upon the title, it is not to be so strictly and hypercritically interpreted as to deprive creditors of the benefit intended to be conferred;" that it was "to be construed in the same spirit in which it was enacted so as to carry out the benign intention of the legislature," \* \* \* and that "the framers of the statute have in a measure indicated the spirit with which they would have the statute interpreted and effect given to it."

This is the spirit in which this act of 1878, as amended, is to be construed. It must be so construed as to carry out the clear intent of the amendment of 1881, however inconsistent it may appear to be with the provisions of the prior act. It is argued that the act is to be construed as if it were originally passed in the form in which it is now amended. To a certain extent this is true. But where any inconsistency is apparent, we are not to overlook the fact that a subsequent enactment has changed the form of the act, and where it is necessary to give effect to and carry out the intention of the amendment, the prior provision must give way; for where this is the case the subsequent enactment will control the previous one in the prior statute, for a statute is to be so construed that all the parts may have effect (*Williams* agt. *Pritchard*, 4 *T. R.*, 3).

For this purpose, words may be construed in a sense different from their ordinary one, where the act is to remedy some existing mischief, and such a construction is required to render the remedy effectual (*Lyde* agt. *Bernen*, 1 *U. & W.*, 113; *Dwarris on Statutes*, 690, 696, 697, 699). This con-

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struction is to apply to such clauses of the preceding act of 1878 as that the lien is to be "upon the moneys in the control of the said city" in the second, and "contractor of the said city" in the fifth, "due from the said city to the contractor" in the eighth section, and all provisions of a like nature which were appropriate to the original act, the lien being then limited to contracts made with incorporated cities.

The counsel for the city insists that the board of education had in good faith paid over to Vanderbilt the moneys to which only the lien could attach long before the notice of the plaintiff Bell or the defendants Fordyce and Brown had been filed.

The plaintiff Bell filed his notice on the 6th of July, 1860, and the defendants Fordyce and Brown on June 14, 1880. The contract was for \$30,977, and there had been then paid upon it by the board of education to Vanderbilt \$16,500, and after the filing of the notice three further payments were made to the amount of \$14,477, which was the residue of the contract price. These payments were made after the filing of the notices, and after, as we must assume, the liens were docketed in the comptroller's office in the book of liens.

Counsel for the plaintiff insists, as I understand his point, that the liens could not apply to moneys earned after June 8, 1880. Liens are for work that has been done or materials that have been furnished, and they apply to any money due to the contractor when the notices are filed or which grew due under the contract thereafter, and it is what the contractor earns under his contract which is reached by the "liens" (*Radbourne agt. The Seneca Lake Co., &c.*, 57 N. Y., 215.)

If the financial officer of the city, after these notices were filed and docketed in the lien book in his office, paid what thereafter became due upon the contract, regardless of these liens, the claimants are not to lose their right upon the fund which the city must make good, the lien having attached to the fund, and the payment of it regardless of these liens, being wrongful. No less, however, will accrue to the city, as

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it appears by the finding of the referee that before the last three payments of \$14,377 were made to Vanderbilt, he was required to give a bond of idemnity with sureties conditioned that he would repay this amount to the city if the lien created by the filing of these notices were held to be valid. The referee's conclusion is that the amendment contemplated contracts respecting city work on city land so long as the work was in charge of one of the city departments or bureaus.

The difficulty in that construction is that all contracts for city work were already provided for in the previous statute, which extended to all contracts made with incorporated cities, and there was no occasion for such an amendment. In fact, the amendment was necessary only in cases like this, where the contract is not made with the city but the land belongs to the city, and the school-house also, when put upon it, where the city raised the amount that is paid for erecting it by tax, and the board of education, under existing laws, has the making of the contract and the paying out of the money for the erection of the building by drawing upon the comptroller, with whom the money appropriated by the city for the purpose is deposited. The amendment could only be required in peculiar and exceptional cases of this kind, and was intended, in my judgment, to give the creditor all the benefit of the act of 1878 in such cases.

The finding of the referee is, that the notices were filed with the clerk of the board of education, which I think was a substantial compliance with the law requiring them to be filed with the head of the board. Filing with the clerk, who has charge of all the papers and records of the board, is as near a compliance with the statute as was required, and there is nothing in the objection on the part of the city that the clerk is not the head of the board.

The further finding is, that they were filed in the office of the comptroller of the city of New York, the financial officer of the city, which was filing them, in the language of the act. "with the financial officer of the city."

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The cases cited by the referee and relied upon by the counsel for the city (*Cheney* agt. *Woolf*, 2 *Lans.*, 191, and *Rafter* agt. *Sutherland*, 13 *Abb.*, 233) have, in my opinion, no application to the question raised in this case.

In the case of the plaintiff, there is difficulty in the fact that the contract is alleged in the complaint to have been made by Vanderbilt with the mayor, aldermen and commonalty of the city of New York, by or through its properly constituted and authorized board; whereas it was made by him with the board of school trustees. This averment, however, was necessary when the action was brought, which was under the act of 1878 and before the passage of the amendment of 1881.

The answer of the defendants Fordyce and Brown, perhaps, avoids this difficulty by averring the contracts to have been with the proper authorities of the city of New York; for the board of school trustees might very well come under such a designation.

However, as the case was not decided by the referee upon any question arising upon the pleadings, but upon the ground that no lien was or could be created by the notices filed, and as an amendment of the pleadings could be allowed in furtherance of justice, I think it would not be right to dispose of this case finally upon the pleadings. The proper way, in my judgment, is to reverse it, for the reason that the referee erred in holding that the action could not be maintained because the notices were filed with the Board of Education and the Comptroller, and when the case goes back for retrial the proper amendments could be made.

When the amendment was passed these actions were pending to enforce a lien for work done and materials furnished under such a contract as the amendment declared that the acts should apply to.

They were therefore specifically embraced by the amendment, and the legislature had the power to declare that the proceedings in these actions which were before invalid should be valid (*People* agt. *Plank-Road Company*, 86 *N. Y.*, 1).

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In my opinion the judgment upon the report of the referee should be reversed and a new trial ordered.

LARREMORE and BEACH, JJ., concurred.

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## SUPREME COURT.

In the Matter of the Opening of the SPUYTEN DUYVIL  
PARK-WAY.

*Jurisdiction of the commissioners of estimate and assessment for opening the park-way — Laws of 1874, chap. 604 — Waiver by acquiescence.*

A party may waive a statutory and even a constitutional provision made for his benefit, and having once done so, he cannot ask for its protection. And so, too, by acquiescence, or failure to present objections, he may waive the question of jurisdiction, arising out of the interpretation or construction of a statute.

Where it appeared that these commissioners of estimate and assessment were appointed after the posting of notices and advertising according to law, without any opposition having been made by any interested property owner, and no appeal was ever taken from the order appointing them, and they proceeded in the performance of their duties and followed the law strictly in every respect, and were opposed by the parties now making this motion at every step of their proceedings, until the final confirmation of their report:

*Held*, that the moving parties are now precluded from objecting to the jurisdiction of the commissioners or of the court. It is too late for the parties making this motion to object to the jurisdiction of the court, or to the right of the park commissioners to institute these proceedings.

*N. Y. Chambers, February, 1884.*

*Augustin S. Hutchins and Austin G. Fox, for motion.*

*George P. Andrews, corporation counsel, and Arthur Berry, of counsel for the commissioners, &c.*

*Thomas S. Edsall and Henry W. Hayden, for property owners opposing motion.*

LAWRENCE, J.—This is a motion made on behalf of certain property owners to set aside and vacate the order made herein,

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at the special term of this court, appointing commissioners of estimate and assessment, and the order made herein at the special term affirming the report of the said commissioners, and the order made herein by the general term affirming the last above mentioned order, and that the court declare such proceedings null and void, and of no force and effect, and for such other and further relief as to the court may seem just. It would appear anomalous, at the first blush, to ask a justice of this court, sitting at chambers, to vacate and set aside an order made by the general term; but it is claimed that under the acts pursuant to which these proceedings were instituted, no jurisdiction was acquired by the commissioners of estimate and assessment, over the lands taken and assessed, for the reason that the park-way is neither a street, road or avenue within the meaning of chapter 604 of the Laws of 1874. Therefore, the counsel for the objecting parties urge that they are regular in making this motion, on the authority of the case entitled, *In the Matter of the Department of Public Parks to Acquire Land, &c.* (85 N. Y., 459), where it was held that where commissioners of estimate and assessment had been appointed under the act of 1813, in proceedings for the opening of a street in the city of New York, such commissioners have no authority to pass upon the regularity or validity of the proceedings or the constitutionality of the act under which the proceedings are instituted, and that the confirmation of the report of such commissioners only makes the report final as to the matters properly submitted to and determined by them. In that case it seems to have been held that such a question might be presented by motion to vacate and set aside the proceedings, and the court referred in its opinion to the *Matter of the City of Buffalo* (78 N. Y., 362). Notwithstanding, therefore, the apparent anomaly in asking the special term to vacate an order of the general term, made after hearing the parties, I shall proceed to dispose of this motion on the points presented.

It is now well settled that a party may waive a statutory

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and even a constitutional provision made for his benefit, and that, having once done so he cannot ask for its protection (*See the opinion of DANFORTH, J., in the Court of Appeals, In re Application of Edward Cooper, Mayor, &c., to Acquire Lands for Gansvoort Market, decided October 23, 1883*).

Now in this case I think it may be argued, with very great force, that it is too late for the parties making this motion to object to the jurisdiction of the court, or to the right of the park commissioners to institute these proceedings. It appears by the affidavit of Mr. Berry, the assistant corporation counsel having charge of these proceedings, that on the 5th of November, 1878, notices that a motion for the appointment of commissioners of estimate and assessment would be made on November 30, 1878, were posted upon the lines of the proposed park-way, in the manner prescribed by law, and that notice was also duly published in the City Record; that on the 4th of December, 1878, the commissioners were duly appointed upon the motion of the then counsel to the corporation, without any opposition having been made by any interested property owner.

That no appeal was ever taken from the said order; that thereafter the commissioners of estimate and assessment proceeded in the performance of their duties, and on or about the 20th day of December, 1880, deposited their estimated report for objections, and published and posted notices of the same, and that their report would be presented to the court for confirmation on February 10, 1881. That on March 5, 1881, the bill of costs of the commissioners was presented to the court for taxation. That the same was referred to a referee to take proof and report. That counsel representing some, if not all, of the present moving parties, appeared before the referee on numerous occasions in opposition to the taxation of said bill. That the referee reported to the court on the 19th of April, 1881, and that the same counsel opposed the confirmation of said report. That on the 5th of May, 1881, Mr. justice BARRETT taxed said bill of costs at the amount reported

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Matter of the Opening of the Spuyten Duyvil Park way.

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by the referee. That from his decision an appeal was taken on June 6, 1881, to the general term, by the attorney for Mr. Van Cortlandt, one of the present moving parties.

That on the 29th of May, 1882, the general term affirmed the order of the special term, taxing said costs. That on the 29th of August, 1882, the report of the commissioners was presented at special term for confirmation. That the motion to confirm the same was opposed, among others, by the counsel who had appeared in opposition to the taxation of the costs. That on the 9th of January, 1883, an order was entered confirming said report. That on the 6th and 14th of February, 1883, appeals were taken from the order of confirmation, by both Van Cortlandt and the city. That in March, 1883, these appeals were withdrawn in open court, and that under the statute of 1874 (*chap.* 604) the awards became due and payable immediately upon the confirmation of the commissioners' report. Under these circumstances, I think it must be held that the moving parties are now precluded from objecting to the jurisdiction of the commissioners or of the court. Most, if not all of them, have been heard at every step and stage of the proceedings, and their objections have been duly considered. All have been notified as required by law. If there was anything to be passed upon by the special term, or the general term, which was not urged by counsel, I think such matters must be deemed to have been waived. It certainly would be strange, that a party by acquiescence, or failure to present objections, can be held to have waived an absolute constitutional right, and yet that such party cannot be held to have waived the question of jurisdiction arising out of the interpretation or construction of a statute. It does not seem necessary to go further upon this point than to refer to the opinion of the court of appeals in the matter of Cooper, hereinbefore cited. As to such objections as have already been heard and argued at the special and general terms, I shall hold myself precluded from discussing them, and as to such objections as

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might have been raised by these parties in the former hearings, and which were not raised (if any such there were), I am of the opinion that the moving parties must be deemed to have waived them. An examination of the opinions heretofore rendered by the general term and special term, shows conclusively to my mind that the position is unsound, that the courts have determined that the land in question has not been taken for a street, road or avenue, square or public place, &c., in the sense in which these terms were used in section 1 of chapter 604 of the Laws of 1874. DANIELS, J., in delivering the opinion of the court in this case (27 *Hun*, 305), simply held that the parkway was not, strictly speaking, a street or avenue, as those terms were used in chapter 483 of the Laws of 1862, or a street, avenue, square or public place within chapter 86 of the Laws of 1813, and that the fees of the commissioners were not fixed or determined by such acts, and that therefore said commissioners were entitled to receive a reasonable compensation for the services performed by them. This was very far from determining that the lands in question were not to be appropriated for public use, as a street, road, avenue, public square or public place within the meaning of the act of 1874. And I agree with Mr. justice POTTER, that the general term has not held that the proposed parkway is not a street, avenue or road, but simply that it was not such an one as had been surveyed and mapped in the older part of the city, and as was contemplated by the legislature when the acts of 1813 and 1862 fixing the compensation of the commissioners were passed. In conclusion, as this case has been twice presented to the general term in different phases, and as the general term has not only affirmed the taxation of the costs of the commissioners, but also confirmed the report of such commissioners, I shall not assume that that tribunal has acted without jurisdiction, and therefore I am of the opinion that this motion should be denied, with costs.

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Matter of the Application, &c., of Caleb B. Le Baron, deceased.

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### SURROGATES' COURT.

In the Matter of the Application for the sale of the Real Estate of CALEB B. LE BARON, deceased, for the payment of his debts.

*Claims against a decedent, presented to administrator and admitted to be valid— On whom is burden of proof— Where the objector is merely a creditor, section 829 of Code of Civil Procedure excluding a party interested from testifying does not apply.*

Upon an application for the sale of the real property of a deceased person for the payment of his debts, it appeared that such debts were largely in excess of the value of the real estate. A creditor objected to the claims of sisters, heirs and survivors of decedent, upon the grounds that the proof of the indebtedness was too indefinite, and because, under the Code, the evidence of these parties concerning conversations or transactions with the decedent should be excluded:

*Held, first*, that these claims having been presented to the administrator and by him admitted to be valid, the burden of proof is upon the objector.

*Second.* The testimony as to conversations or transactions with the decedent not being against the administrator or survivor of a deceased person, the objector being merely a creditor, section 829 of the Code, excluding a party interested from testifying "against the executor, administrator or survivor of a deceased person," &c., does not apply.

*Kings county, July, 1884.*

*Blanchard, Gay & Phelps*, for administrator and for Mary E., Oceana H., and Anna G. Le Baron.

*George Wilcox, Rufus L. Scott, Mr. Powell, Adrian Van Sinderen and A. W. Gleason*, for objecting creditors.

BERGEN, J.— This is an application brought under section 2750 of the Code of Civil Procedure directing the sale of real property of a deceased person for the payment of his debts. Upon the return of the citation a number of creditors appeared and presented their claims. The claims of Anna G. Le Baron for \$2,405.57; Oceana H. Le Baron for \$19,305.50; and Mary E. Le Baron for \$23,372.53; and the administrator for

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Matter of the Application, &c., of Caleb B. Le Baron, deceased.

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the sum of \$926.40, were disputed. It appears by the evidence that the personal property is insufficient to pay the debts of the decedent, and therefore the creditors are compelled to resort to the real estate of the decedent for the payment of the same. It also clearly appears that the debts of the decedent are largely in excess of the value of the real estate, and that in no event could the creditors receive more than a small *pro rata* amount of their claims. William A. Jones, who has presented and proved his claim, objects to the claims of the Le Baron family, to wit: Oceana H. Le Baron, Mary E. Le Baron, and Anna G. Le Baron, who are sisters of the decedent, first, upon the ground that the proof of the indebtedness is too indefinite; second, that under section 829 of the Code all the evidence of these parties concerning conversations or transactions with Caleb B. Le Baron should be excluded; third, that the discharge in bankruptcy of Caleb B. Le Baron estops these claimants from establishing their claims.

I have carefully reviewed all the testimony taken in these proceedings, and am of the opinion that these claims were sufficiently proved, unless the testimony given by the claimants as to the conversations and transactions with the decedent should be stricken out. It appears from the account of the administrator on file in this office, and the evidence in these proceedings, that the administrator had admitted these claims. The petitioning creditor simply objects to the said claims, but offers no evidence to show that they are not valid.

It seems to me that the claims having been presented to the administrator and by him admitted to be valid claims against the estate, establishes *prima facie* their validity, and puts the burden of proof upon the objector (*Matter of Fraser*, 92 N. Y., 239). Section 828 of the Code declares "that a person shall not be excluded or excused on account of interest except as otherwise specially provided." Nor do I think that it comes within the exception provided in section 829 of the Code, which declares "that a person or a party interested in the event \* \* \* shall not be examined in his own behalf

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or interest \* \* \* against the executor, administrator or survivor of a deceased person \* \* \* concerning a personal transaction or communication between the witness and the deceased person, \* \* \* except when the executor, administrator or survivor \* \* \* is examined in his own behalf \* \* \* concerning the same transaction or communication." To exclude evidence under this section, the case must be brought strictly within the wording of the statute. It is not enough to be within its spirit (*Seven agt. National Bank of Troy*, 18 *Hun*, 228; *Lobdell agt. Lobdell*, 36 *N. Y.*, 327). The testimony referred to is not against the administrator or survivor, as the statute says it must be. The administrator admits the claims and the survivor does not object to the evidence. The objector is merely a creditor of the decedent. The statute was enacted to protect the representatives of deceased persons, and they are the only persons who can take advantage of it.

The claimants in this proceeding are the sisters, heirs and survivors of the decedent. They loaned him a large portion of their property, and trusted implicitly in his integrity and ability to pay them. In my opinion they have a strong legal and moral claim upon his estate for the payment of the same.

The only question remaining to be determined is, does the discharge in bankruptcy of Caleb B. Le Baron, in 1868, operate as a discharge of these claimants' debts.

It appears from the evidence that the claim of Anna G. Le Baron arose after the discharge was granted, and therefore is not affected by it; and that the portions of the claims of Oceana H. Le Baron and Mary E. Le Baron which arose prior to the granting of the discharge are not barred by it inasmuch as the proceedings in bankruptcy of Caleb B. Le Baron omitted to mention them as creditors, and that they did not receive any notice of the said proceedings, and that they had no knowledge that he had been discharged in bankruptcy.

I am of the opinion from the evidence that the decedent, Caleb B. Le Baron, willfully and fraudulently omitted their

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names from the schedule of his debts in bankruptcy; that he never caused them to be notified of the said proceedings for his discharge; that he knew he was in debt to these claimants, his sisters, and knew where they resided, as they frequently visited him at his office during and before the time when the proceedings in bankruptcy were in progress. He commenced, in 1850, paying money on account of his indebtedness to each of his said sisters and continued so doing until within a month of his death. By omitting their names from the schedules in bankruptcy, and keeping them and each of them in entire ignorance of his proceedings therein, he deprived them of the right to resist his discharge or to participate in their share of the dividends of his assets.

In the case of *Batchelder* agt. *Low* (S Nat. Bankruptcy Register, 571), it was held "that the discharge is to be pleaded in suits upon claims in courts where pending, and those courts must to some extent determine the validity and effect of the pleas. No other court could consider them and render judgment upon them in those cases. The provision in the same section, that the certificate shall be conclusive evidence of the fact and regularity, seems to relate to the mode of proof of the discharge and not the effect of it when proved. As now understood, the provisions of the bankrupt act do not prevent plaintiffs from contesting the validity of the discharge as to them in this court by showing that it was obtained upon proceedings of which they were fraudulently deprived of notice."

In the case of *Poillion* agt. *Lawrence* (77 N. Y., 211), it was held that where a bankrupt applied for a discharge in a name other than the one in which he contracted the debt, thus depriving the creditor of any notice of the application for his discharge, that it could be attacked in the court in which the creditor sought to establish his claim, and that the discharge would be held inoperative as to the debt of the creditor defrauded thereby by reason of the failure to make him a party to the proceeding by proper publication or otherwise.

I am, therefore, led to the conclusion that by reason of the

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bankrupt having willfully and fraudulently omitted the names and claims of his sisters from his schedules of his debts, and not having given them any notice of the application for his discharge, that the discharge can be attacked by them in this court, and so far as the same affects said sisters it is inoperative.

In reference to the claim of the administrator for having paid taxes upon property at East New York, Kings county, amounting to \$926.40, on November 20, 1883, it appears from the evidence that the same had accumulated upon the property now sought to be sold under these proceedings, for the years 1871, 1872, 1873, 1874, 1875 and 1876, and the property was sold by the state comptroller for arrears of taxes of those years, and that the administrator redeemed the same on the 20th day of November, 1883, in order that the property might not be charged with the additional interest of ten per cent.

While the administrator, strictly, has nothing to do with the real estate of the decedent, and has no right to apply the personal property in payment of claims against the real estate, still, the only property the decedent left of any value was this real estate in question, and the administrator having acted in good faith, and for the best interest of the estate, in redeeming the property from the sale for the unpaid taxes which had been levied and confirmed as a lien upon this real estate prior to the death of the decedent, I think that the same should be allowed to the administrator as a preferred claim against the decedent, with interest thereon from November 20, 1883; for if it had not been redeemed, the taxes would still remain as an existing and first lien upon this property. The administrator having paid them, he should be subrogated to the right the state had against the property for the unpaid taxes.

A decree may be entered in accordance with this opinion upon two days' notice.

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Smith agt. Boyle.

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## N. Y. COMMON PLEAS.

JOHN G. SMITH agt. THOMAS BOYLE and others.

*Assignment — Irregularity in certificate of acknowledgment — When assignment invalid.*

An assignment for the benefit of creditors is not valid, if not duly acknowledged and recorded.

The certificate of acknowledgment of an assignment for the benefit of creditors read: "On this (giving the date) before me personally appeared A. and B., to me personally known to be the individuals described in and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned."

*Held*, that the assignment was invalid because not duly acknowledged and recorded, because the certificate does not set forth that the officer knew the persons acknowledging to be the persons described in and who executed the conveyance. The irregularity in the certificate cannot be cured, so as to give the assignee title or right over the attaching creditors.

*Special Term, February, 1884.**Before VAN BRUNT, C. J., VAN HOESEN and J. F. DALY, JJ.*

APPEAL by plaintiff from judgment in favor of defendants, entered on report of referee dismissing complaint for failure of plaintiff to show a valid general assignment for the benefit of creditors from Clinton H. Smith to himself, by virtue of which he claimed the property described in the complaint. The defect in the assignment was an irregular certificate of acknowledgment in these words:

"STATE OF NEW YORK, }  
CITY AND COUNTY OF NEW YORK, } ss. :

"On this twenty-first day of February, one thousand eight hundred and eighty-two, before me personally appeared Clinton H. Smith and John G. Smith, to me personally known to be the individuals described and who executed the

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same, and who acknowledged to me that they executed the same for the purposes therein mentioned.

“JOHN N. BROWN,  
“ *Commissioner of Deeds, New York county.*”

On the trial before the referee the plaintiff offered the instrument, dated February 20, 1882, and filed in the office of the county clerk of New York county, the same day. Defendant objected to the admission of the assignment on the ground that it was not duly executed and acknowledged. It was admitted that the instrument was signed by the parties to it; that plaintiff took possession of the property mentioned in the schedule annexed to it; that defendants took the property referred to in the complaint, out of plaintiff's possession by virtue of attachments. The referee allowed the assignment in evidence, reserving the question as to the legal effect of the paper until the close of plaintiff's case. The plaintiff rested and defendant moved to dismiss the complaint on the ground that the assignment was not duly acknowledged or executed, as required by the statute.

*John J. Adams*, for plaintiff, appellant.

*Otto Howitz* and *Daniel Clark Briggs*, for defendants and respondents.

J. F. DALY, J. — An assignment for the benefit of creditors is not valid if not duly acknowledged and recorded (*Laws of 1877, chap. 466, sec. 1*; *Rennie agt. Bean*, 2 Hun, 123; *Hardman agt. Bowen*, 39 N. Y., 196; *Britton agt. Lorenz*, 45 N. Y., 51; *Jones agt. Bach*, 48 Barb., 568; *Treadwell agt. Sackett*, 50 Barb., 440). If it be not duly acknowledged the recording goes for nothing; it is not recorded (*Rennie agt. Bean*, above, 2 R. S., 759, secs. 16, 20). In determining the validity of the recording of a conveyance, it is the certificate of the officer who takes the acknowledgment that must be considered, for unless the acknowledgment

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be certified in the manner prescribed by the statute, the instrument is not entitled to be recorded (2 *R. S.*, 759, *sec.* 16). The manner of certifying an acknowledgment is for the officer who takes it to indorse upon the conveyance a certificate of the acknowledgment, wherein he shall set forth the matters required by the statute to be done, known or proved on such acknowledgment, &c. (2 *R. S.*, 759, *sec.* 15). The officer must know or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed such conveyance (2 *R. S.*, 758, *sec.* 9). According to the fifteenth section of the statute, such knowledge shall be set forth in the certificate.

In the certificate of acknowledgment to the assignment before us, it is not set forth that the officer knew the persons acknowledging to be the persons described in and who executed the conveyance. The words "the same" relate to nothing and identify nothing. There is an utter absence of certification by the officer of matters required to be certified. It may be a clerical error merely, but the matters are not in the certificate, and without them the certificate is not in the manner required by the statute, and the conveyance was not entitled to be recorded.

I have referred to the foregoing provisions of the Revised Statutes as applicable to the acknowledgment and recording of insolvent assignments for this reason: The assignment act (*Laws of 1877, above cited*) requires that the assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and recorded in the office of the clerk of the county where the debtor resided or carried on business at the date thereof. The act does not state the requisites of an acknowledgment nor of a certificate thereof.

The assignment act of 1860 provided that the certificate of acknowledgment should be indorsed upon the assignment, but this provision is omitted in the act of 1877. The omission was probably owing to the fact that the Revised Statutes are explicit as to how acknowledgments shall be taken and certi-

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Deuel agt. Sanford.

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fied. The act of 1877 merely requires that the assignment shall be duly acknowledged. "Duly" signifies regularly, or exactly (*People* agt. *Walker*, 23 *Barb.*, 304), that is to say, in conformity with some regulation on the subject; and as the only rule in the matter is found in the Revised Statutes, the acknowledgment and certificate must conform to them.

Under the act of 1860 it was held that the assignment was invalid if not acknowledged before delivery. Under the act of 1877 no time is fixed for acknowledgment, but it must be before recording, for the reasons above stated, and under the authorities above cited, if the instrument be not acknowledged and recorded, it is invalid and passes no title to the assignee.

The irregularity in the certificate of acknowledgment cannot be now cured so as to give the assignee title or right over the attaching creditors, the defendants. He gets no title until the assignment is recorded. If no rights intervene he might obtain a proper certificate and have the assignment recorded properly, but his title to the assigned property would vest only from that time.

The referee was right in giving judgment for defendants, and it must be affirmed, with costs.

VAN BRUNT and VAN HOESSEN, JJ., concurred.

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### CITY COURT OF NEW YORK.

JOSEPH M. DEUEL, plaintiff, agt. ALANSON G. SANFORD,  
defendant.

*Complaint upon promissory note—Answer—When not to be stricken out as sham or frivolous.*

Where the complaint was upon a promissory note, and alleged that it was "made by defendant to his own order for value, and was indorsed and delivered to one T., and that T. indorsed and delivered the same before maturity to D., as plaintiff is informed and verily believes, who thereafter and before maturity sold and delivered the same to plaintiff." And the answer was a denial that the defendant made, indorsed and

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Deuel agt. Sanford.

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delivered the note as alleged in the complaint to T. for value, and of any knowledge or information sufficient to form a belief of the allegations of the complaint that said T. before maturity or at any time indorsed and delivered the said note to D., or that D. sold and delivered the same to plaintiff:

*Held*, that the issues raised by the answer are material and the denials cannot be stricken out as sham. The frivolous character of the answer must be apparent without argument to make it frivolous.

*Special Term, June, 1884.*

HYATT, J.—Motion to strike out answer as frivolous and sham. The complaint alleges the making of a promissory note by the defendant to his own order for value received, and its indorsement and delivery to one Tufts; also that said Tufts indorsed and delivered the same before maturity to James M. Deuel, as plaintiff is informed and verily believes, who thereafter and before maturity sold and delivered the same to plaintiff.

The first and second denials are practically the same; a denial that the defendant made, indorsed and delivered the note as alleged in the complaint to George A. Tufts for value.

The fourth and fifth denials are “of any knowledge or information sufficient to form a belief of the allegations of the complaint, that said Tufts before maturity or at any other time indorsed and delivered the said note to James M. Deuel,” and likewise, that said “James M. Deuel sold and delivered the same to the plaintiff.”

The issues raised by the answer are material (*Snyder agt. White*, 6 How. Pr. R., 321; *Sherman agt. Bushnell*, 7 How. Pr. R., 171; *Roby agt. Hallock*, 55 How. Pr. R., 412). The denials cannot be stricken out as sham (*Wyland agt. Tyssen*; and *Thompson agt. Erie R. R. Co.*, 45 N. Y., 281, 468). The plaintiff's argument to demonstrate the answer to be frivolous, precludes him from establishing that claim; its frivolous character must be apparent without argument to make it frivolous.

Motion denied, with ten dollars costs to the defendant to abide the event.

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The People, &c., *ex rel.* McIntyre agt. Hurlburt *et al.*

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### SUPREME COURT.

THE PEOPLE, &c., *ex rel.* ELLEN MCINTYRE agt. HENRY A. HURLBURT *et al.*, as commissioners of emigration of the state of New York.

*Pauper immigrants — Commissioners of emigration — Their powers and duties as to such immigrants — When courts will not interfere with their action.*

Congress has the right to regulate the terms upon which immigrants shall be allowed to enter this country, and have also the power to determine the manner and means by which such protection shall be afforded.

Where the commissioners of emigration (who are the agents of the United States) certify that they have made an examination, and that they have found that the relators are persons unable to take care of themselves without becoming a public charge:

*Held*, that upon this state of facts, the commissioners had a right to say that they should not be permitted to land, and this court, upon *habeas corpus*, cannot interfere with their action.

The commissioners of emigration, by taking the relators from the steamship and into their custody, and permitting them to land for the purpose of making the necessary examination, in order to ascertain whether, under the laws, they should be permitted to enter the country, do not lose their jurisdiction.

*N. Y. Chambers, August, 1884.*

PATRICK CARNEY, his wife and seven children, and Adam Slovitz, detained emigrants who landed on the sixteenth day of July, from the Furnesia, were brought before this court at chambers upon a writ of *habeas corpus*, and their discharge asked for.

*Alfred Steckler*, for application.

*Kelly & MacRae*, in opposition.

VAN BRUNT, *J.* — By the act of congress relating to emigration to the United States, it is provided that the secretary of the treasury is charged with supervision over the business of emigration to the United States, and for that purpose he

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The People, &c., *ex rel.* McIntyre agt. Hurlburt *et al.*

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was empowered to enter into contracts with such state commission, board or officers, as might be designated for that purpose by the governor of any state, to take charge of the local affairs of immigration in the ports within said state. Said act further provides that it shall be the duty of such state commission or officers so designated to examine into the condition of passengers arriving at the ports within such states in any ship or vessel, and for that purpose all or any of such commissioners or officers, or such other person or persons as they shall appoint, shall be authorized to go on board of and through any such ship or vessel, and if on such examination there shall be found among such passengers any convict, idiot, or any person unable to take care of himself or herself, without becoming a public charge, they shall report the same to the collector of such port, and such persons shall not be permitted to land.

It is not necessary to discuss here the power of the congress of the United States to regulate the terms upon which immigrants shall be allowed to enter this country. It is clear that congress has the right, and it has not yet been held that the states have not that right, to prohibit pauper immigration, and therefore has also the power to determine the manner and means by which such protection shall be afforded.

They have therefore provided for contracts to be made by the secretary of the treasury with certain state boards, who, for the purposes of the immigration laws, thereby become the agents of the United States. Certain powers are conferred upon such agents, and when acting within the line of their duty, I can see no power vested in this court to interfere with them. In the cases now before the court, the commissioners certify that they have made an examination and that they have found that the relators are persons unable to take care of themselves without becoming a public charge. Upon this state of the record, the commissioners had a right to say that they should not be permitted to land, and this court, upon *habeas corpus*, cannot interfere with their action.

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The People, &c., *ex rel.* McIntyre agt. Hurlburt *et al.*

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It is urged, however, that because the relators have been taken from the steamship and have been taken into the custody of the commissioners of emigration, that they have been permitted to land, and that all jurisdiction by the commissioners has been lost.

It must be observed that the examination need not be upon the ship, and the only reference to the vessel is in connection with a power given to the commissioners to go on board and through any vessel for the purposes of such examination, but the act nowhere requires the examination to be held upon shipboard. It is true that the relators have been allowed to leave the ship, and thus may be said to have been permitted to land; but the language of the act is to be construed not literally, but in the light of the duties to be performed under it. The relators are under the custody of the agents of the United States government, having been there placed in order that the examination might be made to ascertain whether, under the laws, they should be permitted to enter the country, and it is this permission which is evidently referred to in the act where it speaks of permission to land.

Could it be argued for a moment that if the relators had been taken possession of by the quarantine authorities and placed in one of their hospitals upon one of the islands in the bay, for sanitary reasons, and before they had come under the jurisdiction of the commissioners of emigration, that such commissioners would have no authority to exercise the powers conferred upon them by congress?

It seems to me that this illustration clearly shows that no technical meaning is to be given to the words "permitted to land," but that they are to be construed as referring to a permission to enter the country, and I am therefore of the opinion that the writs should be dismissed.

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Matter of the Objections filed by Woodward & Worthington.

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N. Y. COMMON PLEAS.

In the Matter of the Objections filed by WOODWARD & WORTHINGTON, appellants, to the claims of PHILIP L. MEYER, respondent, under the general assignment of ALVES FEIGELSTOCK.

*Assignment—Claims, how proved—Proof of debt in bankruptcy when not a waiver of a creditor's right to share in the dividends of an assigned estate—Power of referee appointed to pass assignee's account to extend the time in which other claims may be filed.*

The books of a firm are competent and proper evidence to determine the amount of a claim in favor of one partner against the other, so as to entitle the claimant to share in the dividends of an assigned estate, even though the objections to the claim are made by a creditor of the assignor having no relations to the firm and being a stranger to the transactions set forth in the books.

Proof of debt in the bankruptcy of the assignor, without disclosing the lien under the assignment, does not waive the creditor's right to the dividend.

*Ansonia Brass and Copper Co. agt. Babbitt* (74 N. Y., 395), distinguished, and sections 5075 and 5105 of the United States Revised Statutes construed.

In any event, to entitle a creditor to claim a waiver by his co-creditor to a dividend out of the assigned estate, by reason of the latter's proof of debt in bankruptcy, it must affirmatively appear that the proving creditor had knowledge of his lien under the assignment.

A referee appointed to pass the assignee's accounts, and to hear and determine the issues raised by objections to certain claims, has the power to extend the time in which other claims may be filed, so as to entitle them to a distributive share in the assets.

*General Term, July, 1884.*

*Before C. P. DALY, C. J., LARREMORE and BEACH, JJ.*

*Charles M. Hall, for appellant.*

*Ira Leo Bamberger, for respondent.*

LARREMORE, J.—On July 10, 1876, Alves Feigelstock made a general assignment for the benefit of all his creditors to

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Matter of the Objections filed by Woodward & Worthington.

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William I. Preston. In the schedule of said creditors the amount of the claim of I. T. Meyer & Co., New York, is put down as unknown, as an unascertained balance due after the accounts were written up. Meyer & Co. had previously made an insolvent assignment (October 20, 1875) to Frederick Lewis, in which no mention is made of the claim against Feigelstock. But Meyer testified that such omission was not his fault. A reference was ordered by this court to pass the account of Preston as such assignee, and to hear and determine the issues raised and objections made to any claims presented. A report was made and confirmed by this court July 23, 1883, overruling the appellant's exceptions thereto, and of which he now asks a review.

It appears by the record that on December 9, 1876, Meyer, who had carried on business under the firm name of Isaac T. Meyer & Co., was adjudged a bankrupt by the United States district court, and subsequently made a composition with his creditors, which was allowed by said court by its order July 20, 1877. After this composition was effected, Isaac T. Meyer and Lewis, his assignee under the general assignment, transferred the claim against Feigelstock to Philip L. Meyer, who presented and proved the same before the referee, who allowed it at the sum \$59,960.25, and interest thereon. Two other claims against Feigelstock which had been assigned to Philip L. Meyer, were also allowed by the referee, one of \$3,567.05 and interest, to S. I. Bendiner; another of \$563.50 and interest, to William F. Mittendorf.

Feigelstock was adjudged a bankrupt July 31, 1877, in which proceedings Lewis, general assignee of Isaac T. Meyer, and Bendiner and Mittendorf were petitioning creditors upon their respective claims as unsecured debts. Bendiner and Mittendorf proved their claims in bankruptcy without stating the fact that they were named as creditors, in the general assignment of Feigelstock to Preston.

It was agreed upon the argument that all objections to the form of the report should be waived, and that the appeal

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Matter of the Objections filed by Woodward & Worthington.

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should be heard upon its merits. This brings up for review the exceptions filed to the report by Woodward and Worthington as to the three claims of Philip L. Meyer, which were allowed by the referee.

*First.* The indebtedness of Feigelstock to Isaac T. Meyer in the sum of \$68,459.61.

Whatever suspicion attaches to the fact of the omission of this claim from the schedule made and verified by Isaac T. Meyer, October 29, 1875, the referee could not disregard the books of account and the testimony of the witness Robb. I think the evidence offered justifies the conclusion that the alleged indebtedness existed and was properly allowed by the referee.

*Second.* The Mittendorf and Bendiner claims.

To these the first objection raised was that their presentation was made too late for recognition. The answer to this objection is found in the order of reference. The referee was authorized to fix the time when claims should be presented, and as incident thereto had the power to enlarge that time for sufficient reason shown.

The second objection urged is that the several claimants participated in the bankruptcy proceedings against Feigelstock upon what appeared to be unsecured debts, suppressing the fact that they were entitled to a dividend *pro rata* under the general assignment made by Feigelstock.

In *Ansonia Brass and Copper Co. agt. Babbitt* (74 N. Y., 395) the plaintiff had a specific lien by execution and levy upon the property in question, but proved his debt before the register in bankruptcy without disclosing his lien, and directed the sheriff to return the execution immediately. In this case it was held that the plaintiff by proving its debt without disclosing its security, had released its lien, and the property passed to the assignee freed therefrom.

But it cannot be seriously contended that creditors like Meyer, Mittendorf and Bendiner, under a general assignment without preferences, are included within the class referred to

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The People *ex rel.* McIntyre agt. Hurlburt *et al.*

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in sections 5075 and 5105 of United States Revised Statutes, nor in the decision of judge VAN HOESSEN, *In the Matter of Backer* (2 Abb. N. C., 379). It does not appear that at the time the said creditors proved their claims in bankruptcy, they had any knowledge that they had been named in the insolvent assignment, and without such knowledge there could be no waiver of their claims.

The judgment and order appealed from should both be affirmed, with costs.

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### SUPREME COURT.

THE PEOPLE *ex rel.* ELLEN MCINTYRE agt. HENRY A. HURLBURT *et al.*, as commissioners of emigration of the state of New York.

*Pauper immigrants — Stay of proceedings will not be granted pending appeal from order dismissing writ of habeas corpus to try the question of the detention of pauper immigrants detained by the commissioners of emigration.*

A decision under one writ of *habeas corpus* refusing to discharge a person restrained of his liberty, does not bar the issuing of a second writ by another court or officer.

As the rule affords the relator a speedy method of ascertaining the views of the judges who constitute the general term, and secures to him all the benefits of an appeal, a stay of proceedings will not be granted.

It seems doubtful whether the state courts possess jurisdiction to release the relator from the restraint in which he is held, as the commissioners of emigration are to be regarded as officers of the United States in reference to the examination of pauper immigrants.

The practical effect of granting a stay of proceedings in this case would be to enjoin agents of the federal government from exercising functions devolved upon them by a law of the United States relating to a subject matter clearly within the legislative powers of congress. Even if the state courts have concurrent jurisdiction, the federal tribunals clearly constitute the most appropriate forum within which to test the constitutionality of such legislation.

*N. Y. Chambers, August, 1884.*

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The People *ex rel.* McIntyre agt. Hurlburt *et al.*

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APPLICATION for a stay of proceedings pending appeal from judge VAN BRUNT, dismissing the writ of *habeas corpus* in the case of Adam Slovitz, one of the pauper immigrants detained by the commissioners of emigration (*See ante*, 356).

*Charles Steckler*, for the motion.

*Kelly & McRae*, opposed.

BARTLETT, J. — I have carefully considered the facts presented upon this application, and have come to the conclusion that I ought not to grant a stay of proceedings.

The relator's counsel truly says that the questions involved are novel and important, and he desires to have them examined by the appellate branch of the supreme court before his client is sent back to Europe. But he can obtain the opinions of the general term justices, or a majority of them at once, without waiting until they meet as a court in October. The questions already passed upon by Mr. justice VAN BRUNT may successively be presented to the general term justices in a proceeding of the same character. A decision under one writ of *habeas corpus* refusing to discharge a person restrained of his liberty does not bar the issuing of a second writ by another court or officer. This is the law of England, of the federal courts and of the state of New York (*Ex parte Partington*, 13 M. & W., 679; *Ex parte Kaine*, 3 Blatchford, 1; *People ex rel. Lawrence agt. Brady*, 56 N. Y., 132). The rule affords the relator a speedy method of ascertaining the views of the judges who constitute the general term, and secures to him substantially all the benefits of an appeal.

These remarks are based upon the assumption that this court possesses jurisdiction to release the relator from the restraint in which he is held. It does not seem to me by any means clear, however, that such is the case. While the authority of a state court or of one of its judges upon writs of *habeas corpus* to inquire into the detention of a person held in custody within the territory of the state cannot be denied because the

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proceedings require a construction of the Constitution and Laws of the United States, the federal courts claim exclusive jurisdiction in cases where the restraint is exercised by officers of the United States acting under their Laws (*Tarble's case*, 13 Wallace, 397; *Robb agt. Connolly*, 111 U. S., at foot of page 637). "If a party thus held be illegally imprisoned," said Mr. justice FIELD, in the former case, "it is for the courts or judicial officers of the United States alone to grant him release." I think the commissioners of emigration are to be regarded as officers of the United States, within the meaning of these decisions, in performing the duties imposed upon them by the act of congress, approved August 3, 1882, in reference to the examination of pauper immigrants.

If this view is correct, the practical effect of granting a stay of proceedings in this case would be to enjoin agents of the federal government from exercising functions devolved upon them by a law of the United States relating to a subject matter clearly within the legislative powers of congress. Even if the state courts have concurrent jurisdiction, the federal tribunals clearly constitute the most appropriate forum within which to test the constitutionality of such legislation. They have proved no less efficient than the state courts in asserting the right of personal liberty (*Ex parte Lange*, 18 Wallace, 163; *Ex parte Buell*, 3 Dillon, 116). However poor the relator may be, he is represented by zealous and faithful counsel, who by means of the writ of *habeas corpus* can readily bring before the federal courts the distinctively federal questions involved in this case, confident that "the United States are as much interested in protecting the citizen from illegal restraint under their authority as the several states are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression" (*Tarble's case*, 13 Wallace, 397). The application for a stay of proceedings must be denied.

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The Metropolitan Telephone, &c., Co. agt. The Colwell Lead Co.

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N. Y. SUPERIOR COURT.

THE METROPOLITAN TELEPHONE AND TELEGRAPH COMPANY  
agt. THE COLWELL LEAD COMPANY.

*New York (city of) — Obstruction of street — Right of telegraph company to erect poles in a street — Legislature no power to authorize such erection.*

The legislature has no power, so far as the rights of abutting owners are involved, to authorize the use of the streets of the city of New York for the erection of poles to conduct telegraph and telephone wires, the legislative authority over the streets being limited to a regulation of use for which the streets are held by the city in trust, which is to appropriate and keep them open as public streets; and such erection of telegraph poles is not a street use, and does not come within the terms of the trust. A telegraph company cannot therefore invoke the equitable power of the court to restrain interference by abutting owners with its poles in city streets; even though its lines have been erected under legislative sanction.

*Special Term, August, 1884.*

MOTION for an injunction.

*Burton N. Harrison and H. G. Atwater, for the motion.*

*L. E. Chittenden, opposed.*

INGRAHAM, J. — In the limited time at my disposal I shall only attempt to state the conclusions to which I have arrived after a careful and somewhat extended examination of the principles involved, and the authorities to which my attention has been called.

The act of 1813, under which the street in question was taken for a public street, provides that upon the confirmation of the report of the commissioners appointed under said act by the supreme court, "the said mayor, aldermen and commonalty of the city of New York shall become and be seized in fee of the said lands, &c., in the report mentioned, that shall or may be required for the purpose of opening the said streets, &c., in trust, nevertheless that the same be appropri-

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ated and kept open for or as part of a public street, &c., forever, in like manner as the public streets, &c., in said city are and of right ought to be."

The fee thus vested in the city was in trust for a specified purpose, limited by the purpose for which the property was taken, and the trust upon which it was held; and the use to which the property could be put by the city must be limited by said trust, viz., to be appropriated and kept open as a public street. In *The People* agt. *Kerr* (27 N. Y., 188), and the cases that have followed that case, it was held that a street railroad authorized by the legislature to be built in a street was valid as a proper regulation as a street use. In the case of *Mahady* agt. *Bushwick Railroad Company* (91 N. Y., 148) the court upheld those cases as deciding that such a horse railroad was a structure consistent with the rights of the abutting owners in the streets, and these cases can now only be considered as authority for holding that such a railroad is a street use, and a use which it is within the power of the legislature to control. The power of the legislature over the street is, however, not unlimited; it is to govern and regulate such use or interest in the land as vested in the corporation under the provision of the law for the taking of the property. The city took the property in trust to appropriate it as a public street, and so far as it held it for a public street it was subject to the control of the legislature.

That the power of the legislature over the streets is limited, and that the legislature had no authority to authorize a structure in a street that is inconsistent with such street use, was held in the *Story* case (90 N. Y., 122), and in discussing the question in that case, judge DANFORTH, says, at page 155: "Within this principle its (the street's) surface might be broken up for the insertion of gas or water pipe, or sewers, or occupied by rails imbedded therein for surface railroad, but its limit would be found in these and like uses." It appears, therefore, that the power of the legislature is limited to a regulation of the use for which the property is held by the

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city in trust. As judge DANFORTH says in the *Story case* (*supra*, 157): "It is certainly well settled that when a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the parties from whom it was derived, or for whose benefit it was created.

Under this statute the city takes the fee in trust to be appropriated for a public street. That is "a specific and defined purpose." The property is paid for by the abutting owners; neither the city nor the state pay the amount awarded for the taking of the property, but the owners of the land on the street pay for whatever property is taken. The statute provides that such payment shall be apportioned among such abutting owners as they shall be benefited by the appropriation of such property as a public street; and that such abutting owners have an interest in the streets is recognized in the *Story case* (*supra*) and *Mahady agt. Bushwick Railroad Company* (*supra*). I think, therefore, that the powers of the legislature to regulate the streets are confined to the uses for which they were taken, viz., to be appropriated and kept open as public streets. The plaintiff owns and operates a telephone line in Thirty-ninth street, and uses poles to conduct the wires used in such business, and I am clearly of the opinion that such a use of the streets is not a street use and does not come within the terms of the trust upon which the city holds the fee of the streets; and that so far as the rights of abutting owners are involved, the legislature had no power to authorize plaintiffs to use the streets for such a purpose.

Plaintiffs cite the case of *The People agt. The Metropolitan Telephone and Telegraph Company* (31 *Hun*), but in that case the people were objecting to the use of the streets by plaintiffs, and plaintiffs had the consent of the people for such use. As was said in the *Story case* (page 160), in speaking of the authority given by the legislature, "so far as the public is concerned it may stand; and not so far as to the individual." I do not consider it necessary to express an opinion as to the

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validity of the license given by the city to the defendants. Defendants do not ask the interposition of the court. Plaintiffs do ; and before the court should interfere they must show that they have a vested right, which may be greatly affected by the act sought to be restrained (*City of New York* agt. *Mapes*, 6 *Johns. Ch.*, 50).

It might be claimed with much force that, as according to the well settled rule that a trustee takes no greater title in the property conveyed to him than is necessary to carry out the terms of his trust, that the city of New York took, under the act in question, only such a fee as would be necessary to appropriate and keep open the street as a public street, and that it not appearing that the portion of the street below the surface sought to be used by defendants was necessary to such use, that the fee of such portion of the street did not pass to the city as such trustee, by reason of the proceedings under which the city acquired title to Thirty-ninth street ; and consequently defendants were never divested of the right to use the part of the street in question so long as such use did not interfere with the use of the street as a public street.

It is also claimed that, as defendants had acquiesced in the use of the street by the plaintiffs, they should be now enjoined from interfering with such use. But, as before said, plaintiffs, and not defendants, ask for an injunction, and while under such circumstances a court of equity might refuse an application of the defendants to restrain plaintiffs from maintaining the poles, it does not relieve the plaintiffs from the necessity of showing that some right that belongs to them is about to be invaded.

There are several other questions that were discussed in this case which I have examined, but on the whole case I am of the opinion that plaintiffs have failed to make out a case which would justify me in granting the injunction prayed for, and the motion must be denied and the temporary injunction dissolved.

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Ryer agt. Ryer.

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## SUPREME COURT.

VIRGINIA RYER, respondent, agt. FRANK RYER, appellant.

*Alimony — When payment of, to be enforced by punishment for contempt —  
Code of Civil Procedure, secs. 1772, 1773, 2286.*

An order adjudging the defendant in contempt and directing his commitment for failure to pay alimony awarded by the judgment in a divorce action to the plaintiff, need not contain an adjudication that payment of the alimony could not be enforced by means of security or the sequestration of his property.

Though the court is authorized to relieve a party from further imprisonment, when it appears he is unable to comply with the direction contained in the judgment, yet when such inability arises from his having contracted a second marriage in defiance of the prohibition contained in the judgment recovered against him by the plaintiff, he is entitled to no favorable consideration.

*First Department, General Term, June, 1884.*

*Before DAVIS, P. J., BRADY and DANIELS, JJ.*

DANIELS, J.— The defendant was committed to prison on the 26th of September, 1883, for a contempt of court caused by a failure to pay alimony awarded by the judgment in this action to the plaintiff and directed to be paid by him. The order adjudging him in contempt and directing his commitment contained no adjudication that payment of the alimony could not be enforced by means of security or the sequestration of his property, and it has been objected to as void because of that omission. But neither section 1772 nor section 1773 of the Code of Civil Procedure requires such an adjudication to be stated or recited in the order. All that has been required is that it shall appear presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed by section 1772 or resorting to any security given as therein mentioned. But that it did so appear before the determination was made for the

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commitment of the defendant may be presumed from the facts mentioned in his affidavits upon which he applied for his release from imprisonment. The application for the order was made upon notice, and his own counsel was heard in opposition to it, and it is not to be presumed, when the order is collaterally attacked and has not been appealed from, that any defect existed in the proofs upon which it was made. Neither the case of *Isaacs* agt. *Isaacs* (61 *How.*, 369), nor *Rahl* agt. *Rahl* (14 *Week. Dig.*, 560) sustain the objection taken to this order, and, under the provisions of the Code regulating the proceedings in which it was made, it is to be presumed to have been warranted by the proofs produced at that time before the court.

The lease of the defendant was more especially applied for upon the ground that he was unable to comply with the direction contained in the judgment for the payment of alimony, and when that may appear to be the case, the court has been authorized by section 2286 of the Code to relieve the party from further imprisonment. But in this case the inability of the defendant to pay the small amount directed of five dollars per week seems to have arisen out of the fact that he, soon after the judgment against him, married again in another state, and by that marriage became obligated to devote his earnings to the maintenance of his second wife. If it had not been for this marriage there is reason to believe, from the statements contained in the affidavits, that he would have been able to comply with the directions for the payment of the alimony contained in the judgment; and as he disabled himself from doing so by his second marriage, his disability was voluntary and intentionally created. This was done by an act prohibited by the judgment recovered against him by the plaintiff, and in defiance of the restraints imposed upon him by its terms. It is true that the second marriage, notwithstanding this judgment, was obligatory upon him, as it was solemnized out of this state. But the fact that it was entered into was none the less a violation of the express restraint imposed upon him by

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the judgment action; and having disabled himself from complying with the terms of the judgment by this voluntary and intentional disobedience, he is entitled to no favorable consideration for the purpose of relieving him from the disability and punishment he has in this manner brought upon himself.

The court should not encourage misconduct of this character. For while required to be tolerated, it certainly is not entitled to encouragement where the judgment, as the affidavit shows was its form in this case, prohibits the party in fault from marrying again. He probably could be punished for a contempt in disregarding and violating the provision by afterwards marrying in another state, for the willful disobedience of a lawful mandate of the court is made a contempt (*Code of Civil Pro.*, sec. 8, *subd.* 3); and the term mandate is so broad in the sense in which it was so used as to include "a writ, process or other written direction, issued pursuant to law by a court or judge, or a person acting as a judicial officer, and commanding a court, board or other body, or an officer or other person named or otherwise designated therein, to do, or refrain from doing, an act therein specified" (*Id.*, sec. 3343, *subd.* 2).

But even if the defendant may not be so punished, he is not entitled to the favorable consideration of the court, after having willfully disobeyed the prohibition contained in the judgment forbidding him from marrying again during the lifetime of the plaintiff, and in that manner subjecting himself to imprisonment. As the case is now presented, the order refusing his discharge from imprisonment was right and it should be affirmed, with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concurred.

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Matter of Gleese.

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## N. Y. SUPERIOR COURT.

In the Matter of the Application of ANNIE T. GLEESE for a writ of peremptory *mandamus* against HENRY C. LITCHFIELD, principal of the male department of grammar school No. 13, in the city of New York, and PATRICK H. HORGAN, GEORGE H. BEYER, DANIEL J. MOORE, HIRAM MERRITT and HENRY MAUBER, school trustees of the Seventeenth ward of the city of New York.

*New York (city of) — Public school teachers — How and by whom may be removed — What is a removal — Mandamus the proper remedy where teacher is improperly removed.*

A teacher in a public school in New York city cannot be removed by the trustees of the ward in which such school is situated, except by the approval in writing of a majority of the inspectors of the district, and the approval on appeal of the board of education; and a transfer involving loss of rank and pay is a removal from the position occupied within the meaning of the statute.

A teacher so attempted to be removed has a remedy by *mandamus* to compel the principal of the school and the trustees of the ward, respectively, the former to place such teacher's name upon the monthly pay rolls, and the latter to certify said pay rolls to the inspectors of the district.

*Special Term, May, 1884.*

*Edward M. Shepard, for relator.*

*James J. Thompson, for respondents.*

FREEDMAN, J. — This is an application for a writ of peremptory *mandamus* commanding and requiring Henry C. Litchfield, as principal of the male department of grammar school No. 13, in the city of New York, to prepare monthly pay rolls for the months of February and March, 1884, in such a way as to describe therein the relator as fourth assistant teacher in the primary department of grammar school No. 13, and entitled as such to a salary at the annual rate of \$690, and

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at the monthly rate of fifty-seven dollars and fifty-one cents, and commanding and requiring the other respondents, as trustees of the Seventeenth ward, in which the said school is situated, or a majority of them, to certify the said monthly pay rolls, and to deliver the same, when certified, to the inspectors of the common schools for the inspection district, including the Seventeenth ward.

Between January, 1866, and December, 1873, the relator had held different positions as assistant teacher of a lower grade than fourth assistant in the primary department of said school. In December, 1873, she was duly appointed by the trustees of the Seventeenth ward to the position of fourth assistant, and, except for about three terms during which she held the position of third assistant, she continued to hold the position of fourth assistant until February 1, 1884. She also continued to hold the last named position since the day last referred to, unless the respondents have established that she was legally removed therefrom.

On the 10th of January, 1884, the school trustees of the seventeenth ward, at a meeting held by them, passed the following resolution, viz. :

*“Resolved, That for insubordination and disrespect to a trustee, Anna T. Gleese, fourth assistant P. D. No. 13, be transferred to the position of tenth assistant in said school, to take effect February 1, 1884.”*

The resolution was never approved, in writing or otherwise, by a majority of the inspectors of the district or by any of the said inspectors. The insubordination and disrespect imputed to the relator by the resolution were alleged to have been shown by her principally to Patrick H. Horgan, one of the trustees, in a conversation between her and the trustees Horgan and Moore, in the course of which she was charged with having corporally punished a child in the class taught by her.

From the action of the board of trustees, culminating in the resolution referred to, the relator, on the 19th of January,

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1884, appealed to the board of education of the city of New York, whereupon, on the 23d of January, 1884, the trustees caused a formal charge to be made to the board of education against the relator for an alleged violation by her of the by-laws of the last mentioned board in relation to the infliction of corporal punishment.

The charge was duly investigated by the board of education, and, the trustees failing to substantiate it by proof, the complaint against the relator was, on the 6th of February, 1884, dismissed.

The board of education then took up the appeal of the relator from the action of the trustees transferring her to the position of tenth assistant; and, after an examination of the facts relating to the subject-matter thereof, sustained the appeal, and by resolution of March 26, 1884, directed the trustees to reinstate her in the position of fourth assistant, and that such reinstatement should be dated from February 1, 1884.

This resolution was duly transmitted to the trustees, but they refused, and still refuse, with one exception, to comply with it. They did, however, of their own motion, and as early as February 29, 1884, order a reinstatement by the passage of the following resolution, viz.:

“*Resolved*, That Annie T. Gleese be reinstated to the position of fourth assistant of P. D. No. 13 from which she was removed at a meeting held January 10, 1884, to take effect on May 1, 1884.”

The proceeding now taken by the relator for a *mandamus* is taken with the sanction and approval of the board of education, whose authority in the premises the trustees, with one exception, refuse to recognize.

Upon the facts as they are made to appear, and as to which there is no dispute, it can hardly be doubted that the trustees undertook to punish the relator for having inflicted, as they claim, corporal punishment upon a child. If that offense had been committed, the commission of it would have been a vio-

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lation of a by-law of the board of education (*Manual of the Board of Education* [edition of 1884], sec. 44, p. 120). Upon the report of such a violation the board of education conducts or directs the investigation, and if the charge be sustained, itself directs the punishment (*Sec. 44, subd. 7*).

At the outset of this case, therefore, we have the relator charged with a violation of a by-law of the board of education. We have the relator's innocence of the charge conclusively established by the board of education, the only tribunal which could try the charge. And we then have the ward trustees punishing the relator for an offense of which she was conclusively shown to be innocent, and for which, even if she had been guilty, the ward trustees had no power to punish her.

The respondents, with a single exception, which will be hereinafter referred to, and to which, for that reason and for the sake of convenience, no further reference will be made at present, contend, however that the board of trustees of the ward has by statute the sole and exclusive right of appointment of assistant teachers; that the relator was and is an employe of the said board; that the said board has full and unlimited power to transfer assistant teachers from one position to another, and had full and unlimited power to transfer the relator from the position of fourth assistant to the position of tenth assistant; and that the board of education could not, and cannot, by claiming and assuming appellate jurisdiction in such a matter, confer upon itself such jurisdiction.

This contention does not affect the relator alone, but is of the gravest importance to the whole public school system, and especially to the 3,000 teachers employed in the schools of this city, and its determination will be the first judicial determination of the question whether or not the law affords, as it has been so far supposed to afford, protection in position and salary to every teacher who faithfully and regularly performs his or her duties. In view of this great importance of the controversy, I gave to the points involved the most

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careful consideration, and the conclusions reached will necessarily have to be stated somewhat at length.

At the outset valuable assistance will be derived by a clear perception of the relative powers of the board of education and of the board of trustees of a ward of the city of New York.

*In Donovan agt. The Board of Education* (44 N. Y. Supr. Ct. R. [12 J. & Sp.] 53), I gave an account of the statutes in this state relating to public education in the city of New York, from the passage of the act of 1805 to the year 1873, and of the history of the board of education of the said city, and showed that the said board is a governmental agency created by the sovereign power of the state for the discharge of such powers and duties as were conferred upon it by law, and that in creating it the policy of the state was to instruct and enlighten equally the minds of all children needing education, irrespective of the nationality, religion or pecuniary condition of their parents, and by these means to gradually transform the heterogeneous and uncongenial element of the cosmopolitan city of New York into an intelligent, virtuous, harmonious and happy people.

Since that decision, chapter 410 of the Laws of 1882, commonly known as the New York city consolidation act of 1882, was passed, by which all the special and local laws affecting public interests in the city of New York were consolidated in one act. Such consolidation embraced, among other things, a consolidation of all the statutes relating to public education in the city of New York, and in so far as in such consolidation phraseology is employed which is more comprehensive than the language of a statute superseded thereby, it operates as a new and direct grant of power. It is, therefore, not necessary to refer to the preceding statutes.

Now, section 1022 of the consolidation act provides that the board of education shall "have full control of the public schools and the public school system of the city, subject only to the general statutes of the state upon education." The

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same ample grant of power was repeated in section 1026. The same language is first found in section 4 of chapter 112 of Laws 1873.

In addition to this general grant of power the board of education is further specially authorized, among other things, and it is made its duty :

1. To appoint the city superintendent and the assistant superintendents of schools (*Sec. 1027, subd. 2*).

2. To appoint the principals and vice principals of schools upon the written nomination of a majority of trustees of the ward (*Sec. 1027, subd. 3*).

3. To discontinue any school (*Sec. 1027, subd. 4, 13*).

4. To draw the moneys for the purpose of public education (*Sec. 1027, subd. 5*).

5. To visit and examine the schools (*Sec. 1027, subd. 6*).

6. To make general regulations to secure economy and accountability in the expenditure of school moneys (*Sec. 1027, subd. 7*).

7. To remove any school officer for being interested in furnishing supplies or materials, or in payments therefor, or for immoral or disgraceful conduct in any matter connected with his official duties, or which tends to discredit his office, or the school system (*Sec. 1027, subd. 11*).

8. To take any school entirely out of the hands of the ward trustees, and to take charge of such school, and manage the same where the trustees neglect the school (*Sec. 1027, subd. 12*).

9. To apportion the school moneys to the schools entitled to participate therein (*Sec. 1028, subd. 1*).

10. To provide, by general rules and regulations, for the proper classification of studies, scholars and salaries in such manner that, as near as practicable, the system of instruction pursued in the common schools, and the salaries paid to teachers, shall be uniform throughout the city (*Sec. 1028, subd. 6*).

11. To have the care and control of the title of all school

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property, real and personal, though such title is vested in the mayor, aldermen and commonalty of the city of New York, and to make all necessary appropriations, exceeding \$200 in amount, for the purchase of school sites, and for the erection, fitting up, or repairing of buildings (*Sec. 1029*); and

12. To receive from the school inspectors and school trustees annual reports as to the condition, efficiency and wants of the schools and school premises (*Secs. 1034 and 1035, subd. 5*).

To make more complete the control thus given to the board of education, the latter was further clothed with the power to appoint the trustees of the several wards to fill vacancies, and in proper cases to remove them (*Secs. 1025, 1027, subd. 11*), and to prescribe general rules and regulations and limitations under which the trustees of the several wards are to conduct and manage their respective schools (*Sec. 1035, subd. 3*).

The powers and duties of the trustees of the several wards on the other hand, were extended by section 1035 :

1. To the safe keeping of all premises and other property used for, or belonging to, the schools in their respective wards.

2. To the appointment of teachers other than principals and vice principals and of janitors.

3. To conduct and manage the schools, furnish needful supplies and make needful repairs; but all this under such general rules and regulations, and subject to such limitations as the board of education may prescribe.

4. To keep books of account and records.

5. To make a report to the board of education.

6. To hold as a corporation personal property vested in, or transferred to, them for school purposes.

7. To render accounts to their successors; and

8. To appoint times of meeting and declare vacant the office of one of their number who refuses to attend any three successive stated meetings. They may also nominate principals and vice principals, but the nomination may be utterly disregarded by the board of education (*Sec. 1827, subd. 3*). Their consent is necessary to a discontinuance of any school, unless

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two-thirds of the board of education vote the discontinuance. They may apply to the latter board for a new school, and if their application be refused, they may appeal to the state superintendent (*Sec. 1027, subd. 13*). They may organize new schools when they are duly authorized, and may procure, or hire, or erect a school-house as they may be authorized by the board of education, and in fitting up a school-house may incur expenses not exceeding the amount of \$200 without being specially authorized (*Sec. 1037*). They may remove teachers other than principals and vice principals and janitors, provided the removal be approved by the inspectors, subject to the decision of the board of education upon appeal (*sec. 1038*); and, finally, they must certify all expenses incurred for the schools (*Sec. 1036*).

It is impossible to consider this division of powers and duties and the general scope of this carefully drawn statute, without reaching a conviction that the legislature believed that public policy required in the city of New York a harmonious and effective school system, and that in so vast and cosmopolitan a community, with such varieties of interests, feelings and prejudices, it was essential that the controlling authority should represent the entire city, and not any particular ward or district. To accomplish this result the board of education was invested with full control of the public schools and the public school system of the city, subject only to the general statutes of the state upon education, and for these purposes it was constituted a corporation (*Sec. 1027*). At the same time certain special powers were conferred upon the boards of trustees of the several wards as inferior, though to a certain extent independent bodies, but such powers were well defined and clearly restricted. The result is, that the power of the board of education in educational matters is general, except where it is distinctly restricted, and that the power of the trustees exist only where it is granted in terms. Authority is to be presumed in the board of education, but on the part of the boards of trustees of the several wards it

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must be pointed out either in the statute or in the rules and regulations of the board of education. If, therefore, in any particular matter relating to the administration of the public school system, it appears that the board of education has done a specific thing or given a specific direction within the reasonable limits of such administration, the burden is upon any one who claims the act or direction to be invalid, to find in the general statutes of the state upon education, or in the specific statute organizing the board of education, a plain and express provision limiting the power of the board of education to do the act or give the direction. The case of *The People ex rel. McHugh agt. Board of Education* (18 Abb., 165), upon which the respondents largely rely, was decided before there was made, by the act of 1873, this general grant of power, subject "only to the general statutes of the state upon education." It arose under chapter 386 of the Laws of 1851, by which absolute power of appointment and removal, free from any appeal, subject only to such general rules and regulations as the board of education might adopt, had been conferred upon the trustees.

Having thus considered the general scope of the law and the division of powers and duties made by it, it now becomes essential to examine somewhat more in detail the questions relating directly to the appointment, removal and transfer of teachers other than principals and vice principals. Such teachers, it has already been shown, are to be appointed by the boards of trustees of the several wards (Sec. 1035). This is a mere naked power to appoint. In respect to removals, it is provided by section 1038 as follows:

"The board of trustees for the ward, by the vote of the majority of the whole number of trustees in office, may remove teachers employed therein, other than principals and vice principals, and may also remove janitors, provided the removal is approved in writing by a majority of the inspectors for the district, and provided further, that any teacher so removed shall have a right to appeal to the board of educa-

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tion, under such rules as it may prescribe, and the said board shall have power, after hearing the answer of the trustees, to reinstate the teacher."

But as to transfers the statute is wholly silent. Any transfer amounting to a removal is, of course, covered by the statute. As to all other transfers falling short of that, the board of education may take the initiative. In either class of cases the board of education may make general rules and regulations to be observed by the trustees, and impose limitations upon their action, with this difference, however, that in the case of a transfer amounting to a removal the rules and regulations and limitations must not be inconsistent with the statutory provisions, and that in every other case of transfer they may take any form which, to the board of education, seems proper.

In the exercise of this power the board of education enacted the following by-law, viz.: "Section 34. Upon the dismissal or application for dismissal of a teacher, or upon any transfer of a teacher from one school or department to another, or upon the change in schedule position in any school of a teacher, the board of trustees shall file with the clerk of the board a copy of the resolution under which it acted, and notify the teacher, in writing, of the cause of its action. The teacher shall have the right to appeal to this board within ten days after the service of the notice aforesaid, and said appeal shall be immediately referred to the committee on teachers to examine into the facts and circumstances of the case, and report to this board, and the clerk of this board shall at once forward a copy of the appeal to the board of school trustees whose action is appealed from. Pending the consideration of such appeal no salary shall be paid to any teacher acting in the place of the appellant without the consent of this board first being obtained, nor shall any appointment to the position occupied by the appellant be acknowledged without the consent herein referred to being first had. If this board shall decide that there was no good cause for the action of the

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trustees appealed from, then the teacher shall be restored to the position and salary he or she had previous to the action of the trustees and payment for the intermediate time."

The validity and binding force of this by-law, if it were applicable to the case at bar, could not be questioned, and in such case it would be decisive of the main question involved. But it does not apply, because it was shown to have been enacted since the present contention arose. It cannot have any retroactive effect. The by-laws, as they stood at the time of the origin of the difficulty, referred simply to dismissals, and not to transfers or changes in schedule position. Nor do I deem it worth while to stop to consider whether there is or is not a difference, and if there is, what the nature of the difference is, between the case of a removal contemplated by the statute and the case of a dismissal spoken of in the by-laws as they formerly stood.

The question to be determined narrows itself, therefore, down to this: Was the transfer of the relator equivalent to a removal within the meaning of the statute? Upon this point a clear understanding of the precise position which the relator occupied as fourth assistant, becomes of the utmost importance.

The by-laws of the board of education then in force directed the boards of trustees of the several wards, at the first of each year, to prepare a schedule of salaries to be paid to the assistant teachers, the schedule to exhibit the distribution of the total amount of money to which each school was entitled, and the positions to be numbered in regular order upon said schedule. This schedule, it was further provided, should form the rule for the payment of assistant teachers in the several wards for the year. In pursuance of this direction the respondent, on January 1, 1884, established twenty-three positions of assistants, and designated them numerically as first assistant, second assistant, and so on. The official pay-roll, prepared under the direction of the respondents for January, 1884, distinguish between the same positions and described the relator as fourth assistant. The salary of the first assistant was fixed at

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\$903 a year ; that of the fourth assistant at \$690 ; that of the tenth assistant at \$586 ; and that of the twenty-third assistant at \$500. All this is very clear proof that there are various positions among assistant teachers, and that one of those positions is that of fourth assistant. The most characteristic distinction between the different positions is this difference of salaries, and this subject has been most carefully regulated. In addition to the provisions of the by-laws of the board of education already noticed, section 35, subdivision 6, directs the trustees to grade the salaries of assistant teachers so that the difference between two successive grades shall not exceed \$100. Section 33, subdivision 9, forbids the pay to a substitute teacher of a salary more than three-fourths the regular salary of the position in which the substitute teacher is employed. Moreover, the duties of the assistant teachers vary with the grades which they teach (*Sec. 146*).

There was, therefore, the position of "fourth assistant" fixed by the respondents' own designation and description, shown by the official pay-roll and other official papers, and distinguished by a particular salary and by particular duties. This is obviously, therefore, a position recognized in the educational system and to which its occupant had a particular claim.

Now, by their resolution of January 10, 1884, the trustees of the Seventeenth ward transferred the relator to "the position of tenth assistant," and in their resolution of February 29, 1884, they undertook to reinstate her "to the position of fourth assistant \* \* \* from which she was removed \* \* \* ." This transfer, under the circumstances stated, invoking, as it did, not only the loss of the right to discharge particular duties, but also loss of rank and of pay, was, in my judgment, an attempt to remove the relator from the position of fourth assistant within the meaning of the law. The statute is not to be confined to a removal from office, which is entitled to an entire and absolute dismissal from the public school service. If such had been the intention of the legisla-

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ture, it is but fair to assume that it would have said so in unambiguous language. Instead of that, the statute speaks of removals in general terms. Now, to remove is defined by lexicographers to mean to change place, or to make a change in place in any manner. But for the purposes of this case it is not necessary to go to that length. While, therefore, I do not hold that every transfer of a teacher is, *per se*, a removal within the statute, I am clearly of the opinion that a transfer accompanied by the assignment of inferior duties and by loss of rank and pay, and therefore involving degradation, is, in substance, and therefore amounts to a removal from the position occupied within the meaning of the statute. The trustees, in this case, themselves regarded the transfer as a removal, for in their resolution of February 29, 1884, they speak of reinstating the relator "to the position of fourth assistant, from which she was removed," &c.

The opinion expressed by me is in accord with the views expressed by the learned counsel to the corporation of the city of New York in his communication to the board of education, reported in the minutes of said board of July 3, 1878, and the action of the board of education thereunder since that time.

Nor is there any authority to the contrary. *Reilly* agt. *The Mayor* (16 J. & Sp., 274), *O'Brien* agt. *The Mayor* (28 Hun, 250), and *Monroe* agt. *The Mayor* (28 Hun, 258), were cases that arose under the statutes relating to the fire department. In each of these cases there was an acquiescence in the transfer and a voluntary acceptance of the new appointment, and the decision proceeded upon this ground. Besides, the statutes were entirely different from the one now under consideration. In the case of *Monroe*, it is true Mr. justice DAVIS, in the course of his reasoning, added that "the plaintiff was not removed from his position as a member of the fire department. He was simply transferred from one post to another." But this observation, if it were not *obiter*, was expressly stated by the judge to be based upon the charter

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provision, "that the number and duties of the subordinates in every department, with their respective salaries, shall be such as the heads of the respective departments shall designate and approve." The fire commissioner, Mr. justice DAVIS therefore said, had power to fix and alter, at pleasure, the salary of any employe.

This provision has no application whatever to school teachers or to the trustees of the schools of the several wards, and from what has already been said, it is too clear for argument that it cannot have any application to a school board with such limited powers as are possessed by the trustees of the schools of the several wards.

Nor was there any acquiescence by the relator in the transfer. She did not accept the position of tenth assistant so as to be estopped from asserting her rights. On the contrary, she immediately appealed from the action of the trustees to the board of education, and refrained only from performing the duties of fourth assistant, as far as by the action of her superiors, she was compelled to do so. That in the meantime she did perform the duties of tenth assistant cannot be urged in bar of her claim. She was neither paid as such, nor did she receive, so far, any pay whatever for the period in controversy.

The transfer of the relator, under the circumstances stated, having been shown to amount to an attempt to remove her within the meaning of section 1038 of the statute from the position she held as fourth assistant, the removal, in order to become effective, required, in the first instance, the approval in writing of a majority of the inspectors of the district, and in the second place the approval, on appeal, of the board of education. Neither has been had or obtained. On the contrary, the board of education, upon a hearing of her appeal, sustained her claim and directed her reinstatement, and that such reinstatement be dated from the day the transfer was made to take effect under the resolution of the trustees. She was, therefore, never removed from the position of fourth

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assistant or deprived of any right or emolument attaching to said position.

There is still another point in favor of the relator. Section 38 of the by-laws of the board of education, in force at the time of the passage by the trustees of the resolution of January 10, 1884, provided, and still provides, as follows, viz.:

“No reduction of salary shall be made in the case of any principal or vice principal, or assistant teacher, whose appeal from the action of the board of trustees shall have been sustained by the board of education, except upon the approval of the last mentioned board; and no reduction shall be made in the salary of any teacher whose removal by a board of trustees has not been approved by the inspectors of a school district, or a majority of them, unless the decision of the latter is overruled by the action of this board.”

Under this by-law the claim of the relator would have to be sustained even if her case were treated as involving nothing more than a reduction of salary.

The only remaining question, therefore, is whether the relator has a remedy by *mandamus*.

The *mandamus* is not asked to compel the payment of the money. The respondents have no money in their hands, and it is never their duty to make payment. But there are devolved upon them certain specific ministerial duties, in the performance of which the relator has an interest, and without the performance of which she may be defeated, or at least hindered and delayed, in the enforcement of her rights; for section 1034 of the consolidation act expressly provides that it shall be the duty of the inspectors of common schools, or a majority of them, in their respective districts, to examine in respect to every expense certified as correct by a majority of the trustees of any ward in the district, and to audit every such expense which may be just and reasonable; and that no expense shall be paid unless audited in this manner.

The legal duty of the respondent Litchfield, as principal of the school, to prepare the pay-roll, arises from a by-law of the

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board of education, made in the exercise of the powers of said board conferred by statute. The legal duty of the trustees to certify the pay-roll, when prepared, is imposed by section 1036 of the consolidation act. Thus all the respondents are required by law to furnish to or for the relator certain vouchers, without which she either cannot be paid at all, or without which she will be seriously hindered and delayed in obtaining payment of her just claim.

In such a case the rule that *mandamus* will not lie where the relator has a remedy by action is not applicable, but the courts will compel the performance of the legal duty as an indispensable preliminary to any payment. (*The People ex rel. Satterlee* agt. *Board of Police*, 75 *N. Y.*, 38; *The People ex rel. Navarro* agt. *Van Nort*, 64 *Barb.*, 205; *The People ex rel. Navarro* agt. *Green*, 2 *Supr. Ct. R. [T. & C.]*, 62).

The brief memorandum of BARRETT, J., in *The People ex rel. Harnett* agt. *The Inspectors of Common Schools of the Seventeenth Ward* (44 *How.*, 322) does not conflict with the rule as stated, because in that case the *mandamus* was withheld for the reason that the validity of the relator's appointment was in dispute.

For the reasons stated the relator is entitled to a peremptory *mandamus* against all the respondents as prayed for, with an allowance of fifty dollars costs and her disbursements against all except George H. Beyer. The latter is exempted from the payment of costs because he refrained from opposing the application for a *mandamus* and signified his readiness and willingness to perform his duty in the premises.

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McKinlay agt. Fowler.

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SUPREME COURT.

JOHN D. MCKINLAY and others agt. ANDERSON FOWLER and others.

*Attachment — Against a non-resident — What constitutes residence for the purpose of attachment — When attachment against a non-resident will not be vacated — Code of Civil Procedure, section 636.*

An attachment issued against a firm doing business in Chicago, Ill. ; one of the partners had his domicile in this state, but a part of each year he resided in Chicago:

*Held*, proper.

The place of business of a firm at which its operations are carried on, and where the partners are either continually or at times to manage the business, can properly be called the residence of each of the partners within section 636 of the Code of Civil Procedure.

An attachment against a non-resident will not be vacated on proof that the property attached belongs to a third person.

*Kingston Special Term, July, 1884.*

MOTION to vacate an attachment.

An attachment was granted against the defendants on affidavits showing a cause of action on contract, and that the defendants were residents of Chicago, Ill. The defendant Anderson Fowler, on his own behalf, moved to vacate the attachment so far as it affected him, on affidavits showing that he had a fixed domicile in the city of New York where he lived with his family. It appeared that the other partners were residents of Chicago, and that at different times during each year Anderson Fowler lived in Chicago engaged in the business of the firm. The affidavits were conflicting as to the ownership of the property attached, the defendant claiming that the firm of Frank Clifton & Co. were the owners, and the plaintiffs insisting it belonged to the defendants.

*Simon W. Rosendale*, for defendant and motion.

*Edward J. Meegan*, for plaintiffs and opposed.

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WESTBROOK, J.— A motion is made in behalf of Anderson Fowler, one of defendants, to vacate attachment on two grounds: *First*. That Anderson Fowler is a resident of the city of New York; and *secondly*. That property attached is the property of Frank Clifton & Co., and not of the defendants.

The *business* of the defendants was conducted at Chicago, and for a part of the time, at least, Anderson Fowler *resided* there, though his domicile was in the city of New York. By the Code (*sec.* 636) an attachment issues when “the defendant is \* \* \* not a resident of the state.” The place of business of a firm, at which its operations are carried on, and where the partners are, either continually or at times, to manage the business, can be as properly, for the purposes of attachment proceedings, called the *residence* of each of the partners, as a county through which a railroad passes can be called the *residence* of a corporation to control the place of trial, though its principal office may be located elsewhere. Unless this construction be given to the statute relating to attachments, this case well illustrates how inoperative they would become to secure in many cases the relief they were designed to give. The *Matter of Thompson* (1 *Wend.*, 43), in which it was held, “the right to sue out an attachment does not depend upon a change of *domicile* of the debtor,” is exactly applicable to this case.

The ownership of the property attached affords no ground to vacate the attachment. If Frank Clifton & Co. own the goods seized they can sue the sheriff for taking them, or they may, under sections 657 and 658 of the Code, have the title tried by sheriff's jury. The provision, however, in section 658, that the plaintiff may still hold the property by indemnifying the sheriff, though the verdict of the jury is in favor of the claimant, shows that a remedy sought by motion ought not to prevail. The motion to vacate the attachment is denied, with ten dollars costs.

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United States Trust Co. of New York agt. N. Y., W. S. and B. R. Co.

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### SUPREME COURT.

UNITED STATES TRUST COMPANY OF NEW YORK agt. THE  
NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY  
and ASHBEL GREENE, receiver, &c.

*Receiver — Of corporation — Application for, how and when to be made — By whom — Laws of 1883, chapter 878 — Code of Civil Procedure, section 769, 1810.*

In an action brought by plaintiff to foreclose a mortgage executed by the railway company to secure the issue of certain bonds, said railway extended in part through the county of Orange, which county was accordingly designated as the place of trial in the action, and a motion was made at a special term, held in that county, for the appointment of receivers of the property of the railway company, and such receivers were appointed. On motion made in the first judicial district by C. and S., owners of bonds issued by the railway company to vacate the order appointing said receivers and for the appointment of others:

*Held, first*, that the application for the appointment of receivers of this corporation is included within section 1 of chapter 878 of Laws of 1883, and should have been made in the county of New York where the principal business office of the corporation was located at the commencement of the action, or in an adjoining county, and the order made in Orange county was without jurisdiction and void.

*Second*. That the present application is properly made by and on behalf of two of the persons holding and owning bonds of the railway company secured by the mortgage.

*Third*. That the application now made for the appointment of one or more receivers of the railway company is regularly made in the first judicial district, and the order in form providing for that appointment, made in Orange county, presents no legal obstacle in the way of the exercise of this authority.

*Fourth*. As the order for the appointment of receivers was made without authority in the court to which the application for it was directed, and as it resulted from the application of the plaintiff itself, and it still asserts and maintains the regularity of the proceeding, a case seems to be made out by the facts authorizing the owners and holders of the bonds secured by the mortgage and affected by the order, to apply to the court for such redress and protection as the circumstances and the law applicable to them require in the case.

*New York Chambers, August, 1884.*

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United States Trust Co. of New York agt. N. Y., W. S. and B. R. Co.

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MOTION on behalf of Warren Currier and James F. Sutton, owners of bonds issued by the railway company, and Denis O'Brien, attorney general, to vacate an order appointing Theodore Houston and Horace Russell receivers of the railway company, and for the appointment of one or more receivers.

*Frederick R. Coudert, William L. Turner, John L. Hill and William H. Poste*, deputy attorney general, for the motion.

*Stewart & Boardman, P. B. McLennan and C. B. Alexander*, opposed.

DANIELS, J. — The action has been brought to foreclose a mortgage executed and delivered by the railway company to the United States Trust Company of the city of New York to secure the issue of bonds to an amount not exceeding the sum, in the aggregate, of fifty millions of dollars. By the mortgage, all the property at the time when it was given owned by the railway company, and which should afterwards be acquired by it, together with its corporate franchises of every name and nature, relating to its railway, including the franchise to operate it, were mortgaged as security for the payment of the bonds. It was alleged that the railway company had failed to perform certain of the stipulations, or covenants, contained in the mortgage, and that the right to foreclose it had consequently accrued to the plaintiff. And these allegations have not been denied by the railway company.

The railway in part extended through the county of Orange, and that county was accordingly designated as the place of trial in the action, and it was at a special term of this court, held in that county, that a motion was made for the appointment of receivers of the property of the railway company. Upon that motion, which was not opposed, and the attention of the court was not specially directed to its authority in the case, receivers of all the property and franchises of the railway company were appointed, with the ordinary and usual powers

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and authority vested in receivers in such cases. This order is assailed in this proceeding as having been made without jurisdiction in the court under whose authority it was directed and entered, and it is for that reason that this application has been made to vacate, annul or disregard the order and appoint one or more receivers of the property of the railway company. The attorney general became a party to the application, under the authority of section 7 of chapter 378 of the Laws of 1883. His right to do so has been resisted by the counsel representing the plaintiff, the persons appointed receivers and the defendant, upon the ground that the proceeding was not taken against the defendant as an insolvent corporation, although it is shown to have been insolvent as a matter of fact. It probably will not become necessary to determine whether this objection is well founded or not, for the reason that if the attorney-general had no authority to intervene under this or any other provision of the statutes, the application has been properly made by and on behalf of two of the persons holding and owning bonds of the railway company secured by the mortgage. Their interests require that they should be protected by proceedings legally sustained, in order to subserve and promote the proper administration and disposition of the property of the corporation, and if the persons named in the order, to which reference has been made, were not legally appointed receivers of the railway company, they have a just ground of complaint; for the administration of such persons, if they have no lawful authority, may be injurious or prejudicial to the interests of the persons holding the bonds of the corporation, and when a party in interest, although not a party to the action, may be injuriously affected by an unlawful proceeding in the suit, he may apply to the court for that degree of protection which his interests require should be extended to him (*Gould agt. Mortimer*, 26 How., 167).

In a case of this description, the trustee in the mortgage represents the owners and holders of the bonds, and must usually be the party in whose name and by whom legal pro-

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ceedings for their protection and collection should be carried on, but when the trustee, even without any sinister motive, may become a party to an unlawful proceeding injurious to the rights of the beneficiaries, the latter are empowered to take such action for their own vindication as the necessities of the case may seem to require. When the trustee has committed itself, as it did in the present instance, to a proceeding alleged to have been unlawful and unauthorized, and continues to assert its legal validity, there, if it really be unlawful, a case apparently arises which will justify the intervention in their own behalf of the persons entitled to the benefit and protection of the trust. For this purpose it is not requisite that the trustee should be actuated by any improper motive or controlled by any injurious influence, but it is sufficient that it has identified itself with an unlawful proceeding of which the beneficiaries have a just right to complain, to entitle them to apply in their own behalf to the court for that degree of protection which their legal or equitable interests appear to require. This subject was considered in *Weetjen* agt. *Vibbard* (5 *Hun*, 265), and it was there held that active participation even in a wrong is not required to make a trustee a party to it, but silent connivance will be sufficient for the purpose, when it may be observed to afford the means of rendering the misconduct of others successful (*Id.*, 267). When that may be the fact, and the trustee continues to endeavor to maintain it, there a necessity arises for the beneficiaries themselves to apply in their own behalf for the proper redress which may be afforded by the law.

This general subject was considered in *Brinckerhoff* agt. *Bostwick* (88 *N. Y.*, 52) where it was held that if a corporation itself refused to prosecute, "or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant" (*Id.*, 56). And the same principle is maintained by *Hawes* agt. *Oakland* (104 *U. S.*,

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450). If, therefore, the order for the appointment of receivers was made without authority in the court to which the application for it was directed, as it resulted from the action of the plaintiff itself, and it still asserts and maintains the regularity of the proceeding, a case seems to be made out by the facts authorizing the owners and holders of the bonds secured by the mortgage and affected by the order to apply to the court for such redress and protection as the circumstances and the law applicable to them require in the case. It has been further objected that if the motion could be regularly made by or on behalf of these parties, that it should be made within the district in which the action itself is triable, or in an adjoining county, as that is in terms directed by section 769 of the Code of Civil Procedure; and if the application was controlled by this section the objection would certainly be well founded. But this has been answered by the fact that the principal business office of the railway company was located at the time of the commencement of the action, in the city of New York, and that under section 1 of chapter 378 of the Laws of 1883, the motion could be regularly made there. If this section is applicable to the case, then the motion has been properly made in the first judicial district, for in the class of cases included in the section it has modified, and to that extent superseded, the direction contained in section 769 of the Code. Whether the motion has been regularly brought on in the first judicial district must therefore depend upon what is to be considered the true construction of this section of the act of 1883, and that will more appropriately be considered after disposing of another point presented by way of answer to the motion.

If the order was made by a court having no jurisdiction over the subject contained in it, then it is absolutely inoperative and void, and it may be either vacated or disregarded in any other legal proceeding regularly taken in the action. This subject was considered in *Kamp* agt. *Kamp* (59 N. Y., 212), where it was held that when the court is entirely without jurisdiction, "the whole proceeding, including the order or

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judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it, and assert its invalidity at all times" (*Id.*, 215; *Hall* agt. *U. S. Reflector Co.*, 31 *Hun*, 609, 611).

If, therefore, this order was made without jurisdiction, and the plaintiff insists, as it does, upon its validity, the applicants have the right to apply, as they have, for the appointment of one or more receivers, notwithstanding the making of the order; and as incidental to and forming part of the application it may be determined, if that is its character, that the order in controversy is void for want of jurisdiction in the tribunal making it. The point is accordingly presented whether the order must be so regarded, and that presents for consideration the construction which should be given to chapter 378 of the Laws of 1883. If by this act the application for the appointment of receivers should be made in the judicial district in which the principal business office of the railway company was located at the commencement of the action, or in an adjoining county, then this order was made without jurisdiction and it is void, for Orange county, where the order was made, is not an adjoining county of the county of New York, in which the principal business office of the railway company has been located. That is the clear effect of the concluding part of section 1 of this act. This section is exceedingly broad and general in its terms, as much so, probably, as language was capable of making it. It has been enacted in the following terms:

"Every application hereafter made for the appointment of a receiver of a corporation shall be made at a special term of the court held in and for the judicial district in which the principal business office of the corporation was located at the commencement of the action wherein such receiver is appointed or in and for a county adjoining such district; and any order appointing a receiver, otherwise made, shall be void."

And it was in express language directed to include every application for the appointment of a receiver of a corpora-

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tion, made after its enactment. This broad language is to be applied and enforced according to the usual understanding and import of the terms made use of, and as they have been subjected to no exception whatever, the court cannot add an exception without usurping the province of the legislature, over which it has no control. Neither can the construction and effect of the terms be limited or restricted by any supposed policy not indicated in the act itself. What the court is required to do, with this as well as other statutes, is to ascertain from the language employed the intention of the legislature, and, when that is ascertained, to carry it into effect, as it may be expressed or indicated by the law. In this instance the legislature have declared the intention to be to include every application, after the passage of the act, made for the appointment of a receiver of a corporation. And this language is so broad and general as to include an application for the appointment of a receiver in an action for the foreclosure of a mortgage of this description. The power to appoint such a receiver has been expressly given by section 1810 of the Code of Civil Procedure, and without that it was within the acknowledged jurisdiction of this court, as a court of equity (*Hollenbeck agt. Donnell*, 94 N. Y., 342).

But by this section of the Code the receiver has been designated as "a receiver of the property of a corporation," and this phraseology has been relied upon as distinguishing the case of such a receiver from "a receiver of a corporation," as the words have been made use of in the act of 1883. But that these are convertible terms, and have been intentionally used as such and require practically the same construction, appears from other provisions contained in the Code of Civil Procedure. For by sections 1784 and 1785, actions have been provided, first, in favor of judgment creditors for sequestrating the property of a corporation and providing for the distribution thereof, and, secondly, for the dissolution of a corporation because of its insolvency, or the suspension of its ordinary and lawful business, or its neglect or refusal for

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one year to discharge its notes or other evidences of debt. And by section 1788 it has been provided that receivers in such actions may be appointed, and the judgment in both classes of cases — when the actions may proceed so far — are practically the same, and must provide for a just and fair distribution of the property of the corporation and the proceeds thereof among its fair and honest creditors (*Code of Civil Pro., sec. 1793*). Such receivers as these would very clearly be receivers of the corporation itself, although designated “receivers of the property of the corporation” by section 1788, and they are plainly intended to be within that part of the act of 1883 as follows its fifth section. A like receivership has also been provided in proceedings for the voluntary dissolution of a corporation, and when appointed the officer has been designated as a receiver of its property (*Code, sec. 2429*).

The language of section 1810 was therefore not selected as being peculiarly appropriate to a receiver appointed in an action for the foreclosure of a mortgage, but as properly descriptive of an officer who should be authorized to take charge of the property of the corporation. If it had been intended by these terms to distinguish such a receiver from a receiver appointed in an action for the dissolution of a corporation or a sequestration of its property under the other provisions of the Code, the same phraseology would not there have been made use of, but language would have been employed which would have distinguished one class of receivers from the other. That was not done; but the phraseology is identical, which is applicable to all classes of corporate receivers provided for by the Code, and they are in general terms designated to be receivers of the property of the corporation, and as usually understood and construed these terms are the mere equivalent of the language employed in the enactment of section 1 of the act of 1883. For when a receiver may be appointed under the authority of this section he will take, by virtue of his appointment, no more than he could under either of the pro-

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visions of the Code of Procedure, or than were in terms declared to be vested in the receivers by the order in this action. The object as well as the authority of the receiver of a corporation or of a receiver of the property of a corporation are precisely the same, for the corporation can have no more that can be placed in the custody or under the control of the receiver, than its property, effects and franchises as they have been included in this order. Whether, therefore, the law designates the receiver to be a receiver of the property of a corporation, or a receiver of a corporation, as the language has been used in the act of 1883, the effect is precisely the same, and no tangible ground exists for distinguishing the language employed in this statute from that made use of in the Code of Civil Procedure, and no exception is therefore permitted by the act of 1883 from the generality of its provisions, by reason of the circumstance that the receiver in an action of this nature has been designated by the Code as a receiver of the property of the corporation. No restraint or limitation on account of this mere difference of expression can be imposed upon the very comprehensive language of the first section of the act of 1883, but it must be read as it has been expressed by the legislature, to include every application made after its passage for the appointment of a receiver of a corporation, or of the property of a corporation, which, in legal effect as well as popular understanding, would be the same thing.

If this receivership should be excluded from section 1 of the act of 1883, because of this difference of expression, all receivers of corporations should to whom it has been applied in the Code, for all are described and designated in the same language. And that would completely nullify this part of that act, and wholly defeat the purpose of the legislature in enacting it. It would leave nothing whatever for it to operate upon. And that courts are not at liberty to do.

It has been urged that the case of *Whitney agt. New York and Atlantic Railroad Company* (32 Hun, 154) is at variance with this construction, but in that case the effect of section 8

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of chapter 378 of the Laws of 1883 was alone before the court for its consideration, and the terms of that section were then deemed to be inapplicable to a motion for the appointment of a receiver of a corporation in an action for the foreclosure of its mortgage. That construction was deemed proper for the reason that the section itself was framed in such a manner as to include within its language only proceedings for the dissolution of a corporation or the distribution of its assets, and as the proceeding in this action is controlled by section 1 of the act, which contains no such qualification, but is more general in its language, this decision is inapplicable to the present motion.

The sections following section 5 of the act refer in terms to insolvent corporations, but they contain nothing evincing it to be designed by the legislature that the broad language of section 1, and of the others immediately following it, should be subordinated to this restriction. The nature and object of these parts of the act seem to have been intended to be different, for by the provisions contained in the first and the three succeeding sections, all receiverships of corporations have, in express language been included, while the provisions made by section 6, and those succeeding it to the eleventh section of the act, have been specially framed to meet the cases of insolvent corporations and to direct what should be the practice in that class of cases. These sections contain no language or intimation restricting the terms or effect of the preceding sections of the act to the same class of corporations, the former providing for receivers of all corporations, and the latter regulating the course of practice to be observed in proceedings taken for the dissolution or distribution of the assets of a corporation. Why this distinction has been made is not explained by any language contained in the act, but that it was intended by the legislature is evident from the very general language of the earlier sections, which have in no manner been qualified or subordinated to the provisions contained in the later sections of the act.

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As the application for the appointment of a receiver of the railway company is included within section 1 of the act of 1883, and by it was required to be made in the county of New York, or in an adjoining county, and the order in question was not so made, it is, within the very language of the act, a void order, and cannot stand in the way, therefore, of the success of the present application, even though it may not be in terms proper to formally direct that it should be vacated. It was made without the authority of law, not designedly, of course, but the general language of this section of the act of 1883 was inadvertently overlooked. It is remarkable that such an oversight should have arisen in the proceeding, as it is obvious that the order which was directed and entered conforms in one of its directions to what has been required by section 3 of this act of 1883. It is probable that this oversight arose out of the fact that the proceeding was not a contested one, but the application made by the plaintiff was acquiesced in by the railway company. But such acquiescence could not confer this authority upon the court, when by this act it had been prohibited from exercising it.

The decisions made in *Wilkinson* agt. *North River Construction Company*, and *Phoenix Foundry and Machine Company* agt. *The Same*, and *Woerishoffer* agt. *The Same*, in no manner conflict with the construction here given to the act of 1883, for no different construction of the portions of the act applicable to this proceeding was in any form intimated in either of those decisions. It is also probably needless to add that the case of *Atrill* agt. *Rockaway Beach Improvement Company* (25 Hun, 376), can have no effect upon the determination of this application, for that decision depended upon the effect to be given to section 769 of the Code, unqualified and unaffected by the act of 1883, or any similar act.

From these considerations, it follows that the application now made for the appointment of one or more receivers of the railway company has been regularly made in the first judicial district, and that the order in form providing for that

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appointment, made in Orange county, presents no legal obstacle in the way of the exercise of this authority. One of the persons who was designated in the order, has not been seriously objected to, and from the known character, standing and position of judge RUSSELL, it is very certain that no well founded objection to his capacity or qualifications for the office of receiver could be made. He has entered upon the discharge of the duties of that office under this void order, and so far has acquainted himself with the affairs and business of the railway company, and there seems, therefore, to be good reason justifying his continuance in that position by a lawful appointment, which may be made under the provisions of this act. To discontinue or supersede his employment in this manner would be of no benefit or advantage to either of the bondholders or the parties to the action, but it would cause disturbance, interruption and embarrassment in the management of the affairs, and the transaction of the business of the railway company, and ought not to be permitted. As the result of a careful consideration of all that has been said by counsel, and stated in the affidavits brought to the attention of the court, judge RUSSELL should be continued in this office by the order to be made upon this application, and upon the like security as was required in his behalf by Mr. justice BROWN, who presided in the court in Orange county. As to the other person designated in the order, now considered inoperative, a serious opposition has been made. It is not necessary, for the purpose of rendering it successful, that the allegations made against him should be found to be well founded in fact, for no person should be appointed to such a position whose administration may not receive the confidence of the parties to be affected by it. What has been alleged against him may be entirely without foundation, as it was said to be by Mr. justice BARNARD in *Currier agt. New York, West Shore and Buffalo Railway Company*, and while the objections made, for that reason, would form no good ground for his removal, they might well be entitled still to the effect

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of preventing his appointment. That, however, it is not necessary now to decide, for as to the additional receiver, who is to be the associate of judge RUSSELL, the consideration of the case will be deferred until the bondholders and the parties can be more fully heard upon this subject.

The circumstance of an order having been made by the circuit court of the United States in the district of New Jersey, of a similar import and effect to that made in Orange county, has not been deemed important in this case, for that order proceeded no further than to invest these persons with authority over so much of the railway property as was situated in the state of New Jersey, and as it followed the order which has been considered to have been unauthorized, it could add nothing whatever to the validity of that order.

The disposition already indicated should be made of this application, and it may be proper to add, in conclusion, that in the diversity of the laws enacted to affect the appointment of receivers of corporations, and the frequent changes made by the legislature in their provisions, any one of the justices of this court would have been equally as liable to act under a misapprehension of the state of the law, as did Mr. justice BROWN at the time when the proceeding was brought before him; and as it was not contested, would have been equally disposed to have acquiesced in the assumed regularity of what the parties to the action both consented should be done. Still, that will not sustain the proceeding, but an order must be made, as already suggested, for the appointment of receivers of this corporation, to carry into effect the provisions of the mortgage, as well as the authority which the law has vested in the court over the subject.

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Globe Woolen Company agt. Carhart *et al.*

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## SUPREME COURT.

THE GLOBE WOOLEN COMPANY agt. EDMUND H.  
CARHART *et al.**Attachment—Facts which entitle party to—When will not be vacated.*

Where shortly before an assignment by a firm for the benefit of creditors individual members of the said firm made drafts of moneys belonging to it much larger than they had been in the habit of making at any one time or during any one month, not for the purpose of meeting obligations of the firm, or even for the payment of individual debts, such drafts are a fraud upon creditors justifying the issuance of attachment against the firm's property; and though the property thus taken be afterwards returned, the attachment should not for that reason be discharged.

*N. Y. Chambers, July, 1884.**S. F. Kneeland, for plaintiff.**A. J. Vanderpoel, for defendants.*

VAN BRUNT, *J.*—In disposing of this motion to vacate the attachment herein, it is not intended in any way to pass upon the validity of the assignment made by the defendants to Nathaniel Whitman. The only question which will be considered is, what is the legitimate inference which is to be drawn from the facts showing the drafts made by the individual members of defendants' firm on the sixteenth and seventeenth days of June, as they are admitted by the defendants. The reckless manner in which Mr. Arnold Davison has sworn as to the drafts made by Mrs. M. L. Carhart from the defendants' firm from January 1, 1884, to June 17, 1884, shows that no reliance whatever is to be placed upon his affirmance of any facts and that his affidavit is entirely unworthy of credit.

Mr. Davison swears that he is an expert accountant, and that since the assignment of the defendants herein, he has made an examination of the books of the firm of Carhart,

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Whitford & Co.; that it appears from said books that from the first of January, 1884, to the 17th of June, 1884, inclusive, Mrs. M. L. Carhart drew from the said firm a sum amounting in the aggregate to \$40,803.61. This statement was absolutely false. It did not appear that Mrs. Carhart had drawn any such sum; but that from January 1, 1884, to June 17, 1884, she had drawn the sum of about \$17,800, and Mr. Davison either could not have examined the books as he swore he did, or he stated that the books showed a state of facts which he knew did not exist. Such recklessness in the making of affidavits has become too common, and is deserving of the severest censure.

The defendants admit the drafts of money by them individually on the sixteenth and seventeenth of June. It is admitted that the moneys so drawn belonged to the firm, and there is no pretense that they were drawn for the purpose of meeting obligations of the firm or even for the payment of individual debts. These drafts were much larger than the members of the firm had been in the habit of making at any one time or during any one month.

The facts show that although the making of an assignment had not been determined upon until the afternoon of the seventeenth, or perhaps had not been discussed yet, that grave difficulties were staring the firm in the face. That unless new capital was procured, the firm could not go on with its business, and that the firm might not be able to meet its obligations as they matured. Under these circumstances, upon finding the individual members of the firm drawing much larger amounts from the firm than they had been accustomed to do, not for the purpose of paying any debts then due, the inquiry naturally arises: why were these drafts made? and I am forced to the conclusion that they were made for the future use of the individual members of the firm. No doubt they thought that the firm would eventually pay all its debts, and they did not intend to defraud their creditors, but they wished to have on hand a little ready money upon which to live while

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the process of liquidation was going on, during which they could not expect to receive anything from the assets of the firm, thus secreting property which belonged to their creditors for the purpose of applying it to their own individual uses. It was while the defendants held this money so drawn that the attachment in this case was issued, and the condition of things then must determine the rights of the parties. The defendants then had this money. They had withdrawn it from the reach of their firm's creditors, with the intention of applying it to their individual uses, which they had no right to do, and which was a fraud upon their creditors. If the money had been returned before the issuing of the attachment, an entirely different question might have been presented, but a debtor cannot defeat the rights of a delinquent creditor after his fraud had been discovered by returning the property improperly taken.

Much stress is laid by the defendant's counsel upon the proposition that actual fraud must be shown, and that no proof of such actual fraud had been given in the case at bar. It may be true that the defendants thought that they had a right to take this copartnership property and apply it to their individual uses, but ignorance of the law is no excuse. The law says that such an appropriation by a copartner of copartnership property is a fraud upon the creditors of the copartnership, no matter with what intent it may have been done. The defendants did not intend that this money should go to the payment of their copartnership debts, to which it should have been applied, but they intended to keep and use it for their individual purposes, thereby secreting it and withdrawing it from the creditors of the firm.

I am of the opinion, therefore, that the motion to discharge the attachment should be denied, with costs.

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Apsley agt. Wood.

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## SUPREME COURT.

GEORGE E. APSLEY, appellant, agt. JOHN WOOD, respondent.

*Motion — to set aside judgment entered by default — When such motion which has been denied may be renewed — What are new and additional facts upon which such motion may be renewed.*

Upon the fourteenth day of December the plaintiff entered up a judgment against the defendant by default. The roll shows that the summons was served by one R. The defendant denied that he had been so served and made a motion to set aside the judgment for that reason. The affidavits were conflicting, and on a reference to take proof the referee reported that there had been no service of the summons. The special term denied the motion with leave to renew. The motion was renewed upon an affidavit which impeached the plaintiff's character, and upon the same papers which had been the basis of the former motion:

*Held*, that the statements in regard to plaintiff's character in defendant's additional affidavit were new and additional facts not considered in the former motion and entitled him to renew his motion to set aside the judgment.

*Second Department, General Term, September, 1884.*

*Before BARNARD, P. J., DYKMAN and PRATT, JJ.*

APPEAL from two orders granted by Mr. justice BROWN, one dated February 28, 1883, denying a motion made by defendant to set aside a judgment entered against him December 14, 1882; the other, dated March 6, 1883, setting aside the same judgment on substantially the same state of facts.

The plaintiff appeals from the last named order and the defendant from the first. The facts are substantially as follows: On the 14th day of December, 1882, the plaintiff entered up a judgment against the defendant in Kings county for \$3,161.44 by default. The judgment-roll showed that the summons in the action had been served on the defendant by one Samuel B. Rogers, his affidavit of service appearing on the back of said summons. The defendant denied that he had ever been served with a summons in the action, and claimed

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that the affidavit of Rogers in that behalf was wholly false and made a motion to set aside the judgment for that reason. The affidavits were conflicting and the court ordered a reference to take proof. The referee reported the evidence, with his opinion that there had been no service of the summons on the defendant in the action. Motion to confirm the referee's report and to set aside the judgment was made at special term, based on the affidavits and the evidence taken and on said report. Said motion was denied by the court, with ten dollars costs of opposing same and all disbursements. The costs and disbursements adjudged against defendant, and which the order denying said motion required him to pay, amounted to seventy-five dollars. The court held that said summons had been duly served on the defendant, and that his evidence in denial thereof was wholly false. The order denying said motion contained the provision that "the defendant be allowed to apply to the court upon such other papers and affidavits as he may be advised to set aside said judgment and to defend." The defendant duly appealed from said order to the general term, and without paying or tendering the costs, immediately renewed the motion upon precisely the same state of facts and upon the same papers which were the basis of the former motion, and upon the additional affidavit of the defendant in which he charged plaintiff with various crimes and offenses, in substance, that "plaintiff had been arrested by various persons in Lockhaven, Pennsylvania, and in Boston, Massachusetts," that he had been "arrested for larceny, false pretenses, embezzlement, forgery," &c. Except these vague charges made by the defendant himself, on his information and belief against the character of the plaintiff, no new or additional facts were presented in the second motion not heard and considered in the first. On the argument of the motion various preliminary objections were made by the plaintiff's counsel:

1. That the affidavit of merits was defective and did not conform to the rules of practice.

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2. That defendant had not paid or tendered the costs of the former motion and was stayed till such payment.

3. That said motion being a non-enumerated motion must, under the rules of the supreme court, be noticed for the first day of the term, whereas this motion had been noticed for the second day of the term.

4. That the order to show cause did not state any reason for requiring a shorter notice than eight days.

5. That no irregularities were specified in the moving affidavits, or in the order to show cause why the judgment should be set aside, and no reason or excuse given for opening the default.

6. That said motion was a renewal motion on the same state of facts as presented in the former motion already heard and denied by the court; that the denial of the former motion was a bar to the second or renewal motion, and conclusive of the facts here presented.

7. That the allegations in the moving affidavit of the defendant in regard to plaintiff's character, constituting the "new or additional facts," were incompetent, immaterial and inadmissible for any purpose; that they were scandalous, and the court was asked to suppress them and that the same be stricken from the record.

The objections were severally overruled, and the court granted an order setting aside the judgment on the sole ground that the statements in regard to plaintiff's character in defendant's additional affidavit were "new and additional facts" not considered in the former motion, thus clearly overruling a long line of decisions of general terms and of the court of appeals of this state.

*Anson B. Moore and Andrew J. Moore (Moore & Moore),*  
for plaintiff and appellant:

I. The preliminary objections made by the plaintiff to the motion were well taken and should have been sustained, and the motion denied. 1. The affidavit of merits was defective

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and should have been adjudged invalid. It does not conform in any respect to the established rule of the court and is void. The defendant should swear in his affidavit of merits, on the "advice" of counsel, and not as in this case, that he has a good defense as he is "informed," &c. The rule is well settled that "unless the language of the affidavit strictly conforms to the rule of the courts, it will be treated as a nullity" (*Bretten* agt. *Peabody*, 4 *Hill*, 61, and note; *Brown* agt. *Miller*, 3 *Caines*, 97; *Richmond* agt. *Cowles*, 2 *Hill*, 359; *Swartwout* agt. *Hodge*, 16 *Johns.*, 3; *Carman* agt. *Titus*, 5 *Johns.*, 355).

2. The motion to set aside the judgment was based on the alleged fact of non-service of the summons. That was the only irregularity specified in the affidavits and order to show cause. That motion was denied with costs and disbursements to the plaintiff. The costs and disbursements amounted to seventy-five dollars. The defendant without paying or tendering the said costs, renewed the motion to set aside the judgment. The rule is well settled that where the costs of a motion are not paid, the party in default is absolutely stayed till the same are paid (*Sword* agt. *Wilson*, 3 *Abb. N. C.*, 50; *Lyons* agt. *Murat*, 54 *How.*, 23; *Thaule* agt. *Frost*, 1 *Abb. N. C.*, 297; *Code Civ. Pro.*, sec. 779; see *Throop's note to this section*). The non-payment of costs *ipso facto* stayed all proceedings on the part of the defendants.

3. This was a non-enumerated motion (*Rule 38*; *Hun's Court Rules*, 145). Non-enumerated motions can only be noticed for the first day of the term, and the notice "shall not be for a later day unless sufficient cause be shown and contained in the affidavits served, for not giving notice for the first day" (*See Rule 21*). The rule requiring a motion to be noticed for the first day of the term, is applicable to an order to show cause (*Power* agt. *Village of Athens*, 19 *Hun*, 165). This order to show cause is made returnable the second day of the term, and no excuse is given in the moving papers for not making the same returnable the first day of the term (*Whipple* agt. *Williams*, 4 *How.*, 28; *Ogdensburgh Bank* agt. *Paige*, 2 *Code R.*, 67;

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*Walrath* agt. *Keller*, *Id.*, 129; *Mayer* agt. *Apful*, 2 *Sweeny*, 729). 4. Neither the order to show cause or the affidavits presented, state any reason for requiring a shorter notice than eight days, as required by the rules of practice (*S. C. Rule* 37; *Code Civ. Pro.*, sec. 780). 5. No irregularities are specified in the moving affidavits or order to show cause, for which the judgment should be set aside, and no reason or excuse given for opening the default (*Graham* agt. *Pinckney*, 2 *Hun*, 346; *Lewis* agt. *Graham*, 7 *Rob.*, 147; 16 *Abb.*, 126; 4 *Barb.*, 254; 25 *How.*, 190; 16 *Abb.*, 83; 22 *How.*, 476, 477; 26 *Barb.*, 409; 7 *How.*, 416; 2 *Code R.*, 79). It is sufficient ground for denying a motion to set aside a judgment, if no irregularity is specified in the notice of motion or order to show cause (*Lewis* agt. *Graham*, 16 *Abb. Pr.*, 126). A motion to set aside a summons for irregularity will be denied, with costs, where the notice of motion does not specify the grounds of the motion, or in what the irregularity consists (*Perkins* agt. *Mead*, 22 *How.*, 476, 477). 6. The statements in the moving affidavit of the defendant in regard to plaintiff's character were clearly incompetent, immaterial and inadmissible for any purpose. They were scandalous in the extreme and should have been stricken out on motion then and there made. The plaintiff was an attorney and counselor-at-law, an officer of the court, and was entitled to its protection. The statements therein were interposed for the purpose of disgracing and degrading the plaintiff and to prejudice the court against him and his rights, and were calculated to have that effect, and this court cannot see that it did not have the effect to induce the court below to set aside the judgment. The plaintiff had not been sworn as a witness, nor had he made an affidavit in opposition to the motion, hence the impeaching affidavit was incompetent evidence for any purpose. Evidence that a witness has been indicted for perjury and for forgery is inadmissible to impeach his credibility. (*Jackson* agt. *Osborn*, 2 *Wend.*, 555; *People* agt. *Gray*, 7 *N. Y. R.*, 378; 59 *Barb.*, 619; 49 *Barb.*, 342; *People* agt.

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*Herrick*, 13 *Johns.*, 82; 1 *Greenl.*, 457-463; 15 *Hun*, 269; *Newcomb* agt. *Griswold*, 24 *N. Y.*, 298; *Opinion* by ALLEN, J.; 3 *Waite's Pr.*, 142; *Lee* agt. *Chadrey*, 3 *Keyes*, 225; *Warrell* agt. *Parmley*, 1 *N. Y.*, 519; *People* agt. *Wiley*, 3 *Hill*, 193; *Conway* agt. *Conway*, 6 *N. Y.*, 97; *La Beau* agt. *People*, 6 *Park. Crim. R.*, 371; *Varona* agt. *Scarros*, 8 *Abb.*, 302; *Griston* agt. *Smith*, 1 *Daly*, 380; *Reed* agt. *People*, 42 *N. Y.*, 270; *People* agt. *Crapo*, 76 *N. Y.*, 288; *Jackson* agt. *Lewis*, 13 *Johns.*, 504). 7. The plaintiff is regular in his practice. The defendant does not state any excuse or reason for opening the default; he does not assign any irregularity either in the judgment or execution, hence the judgment and execution should stand (*Moulton* agt. *De Macarty*, 6 *Robt.*, 470-472). If the rules of practice as laid down by this court are to be respected and accepted as a guidance for practitioners, then the foregoing preliminary objections should be upheld and sustained.

II. The motion to set aside the judgment and to defend the action should have been denied by the court below, and the order granted in pursuance thereof should be reversed. This is a renewal motion upon the same state of facts. It is a settled practice in this state that where a motion has been once heard, considered and denied, it cannot be renewed on the same state of facts. In *Mills* agt. *Thursby* (11 *How. Pr. R.*, 114), ROSVELT, J., says: "Where a motion has been fully considered and absolutely denied it cannot again be heard on the same state of facts. A party moving cannot bring forward his objections by installments." In the *People* agt. *Nurcine* (3 *Hill*, 416), COWEN, J., says: "A motion will sometimes be opened on the question being changed by new materials arising afterwards, but not otherwise. But if the facts remain essentially the same at the time of the application to renew that they were when the former motion was denied, the court will not allow the matter to be reheard on the merits" (See *Gatherhead v. Bromley*, 7 *T. R.*, 455; *Simpson* agt. *Hart*, 14 *Johns.*, 63; *Schuman* agt. *Weatherhead*,

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1 *East*, 537; *Allen* agt. *Gibbs*, 12 *Wend.*, 202; *Dollfus et al.* agt. *Frosch*, 5 *Hill*, 493, note "A" to above case; *Hoffman* agt. *Livingston*, 1 *Johns. Ch.*, 211).

III. The defendant was bound to present in his first motion all necessary facts in his possession, or within his knowledge, to entitle him to any relief that he could or would be entitled to under any circumstances. No new state of facts being presented in the second motion not known to the defendant, and duly presented in the first, the second motion was properly met by the established practice that "a party complaining of any proceeding in a cause must embody all objections then existing in one motion. He cannot make a separate motion for each objection" (*Patterson* agt. *Bacon*, 21 *How.*, 478, opinion by INGRAHAM, J., 479; *Desmond* agt. *Wolf*, 1 *Code R.*, 49; 12 *Abb.*, 142; 19 *How.*, 412, 413). In *Schlemmes* agt. *Myerstein* (19 *How.*, 413), which was a renewal motion made in the supreme court for an attachment after, one had been granted at the marine court and set aside; LEONARD, J., says: "Nothing is shown to have occurred or come to the knowledge of the plaintiff or his agents to authorize the granting of an attachment since he applied for and obtained such a warrant in the marine court. The attachment in that court was vacated, after opposition and argument on the merits of the application, on the same state of facts now existing. The facts have been more fully presented in this court, but they are the same which then existed and might have been presented with the same care on the hearing of the motion in the marine court. No new case is here presented. The defendant is not to be continually vexed by the same application, nor are the same or different tribunals to hear and decide the same matters more than once. Motion denied, with ten dollars costs." In *Simpson* agt. *Hart* (14 *Johns.*, 72), PLATT, J., in delivering the opinion of the court in this case, involving the same principle, justly and eloquently says: "The court is not asked to interfere on the ground of newly discovered evidence. It is not a new fact, but merely an additional item

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of evidence, \* \* \* which additional fact existed prior to the motion, \* \* \* and for ought that appears it was known to Simpson, and the evidence of it completely in his power at the time of his application to the mayor's court, but of which it seems he did not then choose to avail himself. No doubt," says the learned judge, "a rehearing may enable a party to come better prepared. He may give additional evidence and urge new arguments upon the point in litigation; but pitiable indeed would be the condition of suitors if these were deemed sufficient grounds, not merely for a new trial but for a new suit in another court of concurrent-jurisdiction. Vexation, expense and delay would be infinite under such a rule. Justice instead of being seated on a stable throne would become an *ignus fatuus*, tantalizing her followers by continually eluding her grasp." In *Smith agt. Spalding* (3 *Robt.*, 615), in delivering the opinion of the court, ROBERTSON, J., says: "Motions may be reheard on leave on special occasions, but not on the same state of facts." The above is a general term decision, and the court cites with approval the following cases: *Fenton agt. Lumberman's Bank* (*Clarke*, 360); *Mills agt. Thursby* (11 *How. Pr.*, 114). "A motion can only be renewed upon new grounds and not upon mere additional or cumulative papers" (*Bascom agt. Feazler*, 2 *How.*, 16; *Roy agt. Conner*, 3 *Edw. Ch.*, 479). "Leave to renew a motion will not be granted to enable a party to present facts which were known to him at the time of his original motion" (*Lovell agt. Mastin*, 12 *Abb.*, 178). "A motion once denied cannot be renewed as a matter of right, except upon a different state of facts arising subsequent to the decision of the former motion" (*Bank of Havana agt. Moore*, 5 *Hun.*, 624; *Bolls agt. Duff*, 56 *Barb.*, 567; 38 *How.*, 492; 7 *Abb. [N. S.]*, 385; 52 *Barb.*, 637; 6 *Abb. [N. S.]*, 442; *Riggs et al. agt. Russell et al.*, 74 *N. Y.*, 370).

IV. The court below having held as matter of fact that the summons in the action had been duly served on the defendant, and that the defendant's evidence in denial thereof was will-

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fully and wickedly false, his moving affidavits, or any evidence of his as to a defense on the merits, should have been disregarded. The letter and spirit of the Latin maxim should have been, and should be, fully and forcibly applied to the defendant and to his defense in this action, *falsus in uno, falsus in omnibus*. It is submitted that if long established rules and well considered legal precedents have any binding force or consideration in this court the order setting aside the judgment will be reversed.

*E. D. Childs* and *C. M. Stafford*, for defendant and respondent:

I. The granting of the order appealed from by the plaintiff rests in the legal discretion of the judge before whom the action was made and decided, and being a discretionary order, it is not appealable (*Martin* agt. *Gould*, 41 *Supr. Ct. [J. & S.]*, 544; *Mead* agt. *Mead*, 2 *E. D. Smith*, 223; *Churchill* agt. *Mallison*, 2 *Hilt.*, 70; *Balton* agt. *Depeysler*, 3 *Code R.*, 141; *Carpenter* agt. *Carpenter*, 4 *How. Pr.*, 139).

BARNARD, *P. J.* — This appeal is based upon an apparently contradictory decision at special term upon the same substantial facts. Upon the 14th day of December, 1882, the plaintiff entered up a judgment against the defendant for \$3,161.44 by default. The roll shows that the summons was served by one Rogers. The defendant denies that he had been so served, and made a motion to set aside the judgment for that reason. The affidavits were conflicting and the court ordered a reference to take proof. The referee reported that there had been no service of the summons. The special term denied the motion with a leave to renew. The motion was renewed upon an affidavit which impeached the plaintiff's character, and upon the same papers which had been the basis of the former motion. The court set aside the judgment so far as to permit an answer to be served. The defendant did answer and the plaintiff appealed; the defendant then appealed from the order refusing to set aside the judgment. The

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plaintiff moves to dismiss that appeal because the defendant renewed the motion and took a benefit under the subsequent order, and is therefore bound to submit to the former order. Upon the appeal from the second order by plaintiff, he claimed to reverse that because the rehearing was improper upon the same fact. If the second order is reversed because it was improper to have the motion a second time heard, and the appeal from the first order by the defendant is dismissed because he is estopped by the second order, the defendant will be without the power to present his case upon appeal. We think the claim made by plaintiff as to the illegality of the renewal motion untenable.

The right to renew was reversed by the order denying the first motion. The additional affidavit of defendant did furnish new facts of weight upon the renewed motion. The plaintiff was stated to be a person likely to procure a false affidavit of service. That he had a bad character; had been arrested for crime and had been found guilty of procuring a deed by fraud. The report of the referee is abundantly sustained by the evidence. The parties to the occurrence disagree. Rogers says he served the paper, Wood denies the service. The surrounding facts are in favor of defendant's testimony.

Rogers was a real estate broker and not a person who was accustomed to serve papers. The claim is a large one, and the plaintiff delayed some three months after he could have entered judgment. Rogers says he served two papers at the same time, one was the summons in this case and the other a summons and complaint in the Kings county court. The defendant employed an attorney in due time to defend in the county court, and although he denies any debt in this case, and although he had a store well stocked in Brooklyn in his possession, he waited until the sheriff came with the execution before making any defense. Although the report of the referee is not subject to as strict a rule in respect to the result upon the disputed question of fact upon issues tried, yet the

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report should stand even if only fairly supported by the evidence. A referee has the benefit of the aid derived from the inspection of the witnesses, and of their manner upon the stand as well as upon the trials of issues in actions. Assuming that the defendant had failed to remember the service, he was still entitled to answer if he had a defense; but we think the summons was never served, from the evidence and report of the referee.

The order should be modified by striking out the request upon plaintiff's part to refer. It should be left optional with him to refer or not. As thus modified, this order appealed from is affirmed, with costs and disbursements. The appeal taken by defendant from the denial of the motion to set aside the judgment should be dismissed, with costs.

PRATT and DYKMAN, JJ., concur.

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## SUPREME COURT.

THE PEOPLE *ex rel.* GERALD O. TULLY agt. ALEXANDER V. DAVIDSON, sheriff.

*Habeas corpus — Bail — Strangers cannot be permitted to become bail for a man without his consent — What amounts only to a voluntary escape — Right of sheriff to retake prisoner on mesne process after an escape.*

The relator was arrested upon an order in a civil suit for conversion. While in custody under this order, which fixed his bail at \$70,000, he was taken to the office of a United States commissioner, where extradition proceedings were begun against him for his extradition to Great Britain upon a charge of forgery. While these proceedings were going on relator was transferred to the custody of the United States marshal. He was finally discharged on *habeas corpus*, by the circuit court of the United States, but was at once rearrested and taken to jail again by persons acting under the pretended authority of an instrument in writing indorsed upon a paper purporting to be an undertaking by bail in the civil suit in the state court. The prisoner knew nothing about this undertaking, but it had been given to the sheriff without his knowledge or consent. It was executed by S. and B., both strangers to the prisoner,

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and accepted by plaintiff's counsel by indorsement thereon. The instrument thus executed and accepted bore a further indorsement whereby B. assumed to depute two persons in his place and stead to arrest and surrender the prisoner to the sheriff in exoneration of B. as bail. On return of writ of *habeas corpus* the sheriff certified that he held the relator by virtue of this "surrender in exoneration of bail," and also by virtue of the order of arrest previously granted:

*Held*, that S. and B. never lawfully became the bail of the prisoner, nor ever possessed any power to surrender him. The sheriff derived no authority to hold him from any act done by either of the self constituted sureties.

The undertaking was a nullity so far as the prisoner was concerned. Strangers cannot be permitted to become bail for a man without his consent. The giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. They cannot be imposed upon him against his will.

*Held*, further, that the transfer of the relator to the custody of the federal authorities and the subsequent transaction in reference to the so-called bail bond, amounted at most to a voluntary escape and the sheriff had a right to retake him by virtue of the original order of arrest which had not become *functus officio* and that he is lawfully in the custody of the sheriff.

*New York Chambers, August, 1884.*

THE relator was arrested on May 21, 1884, upon an order granted by Mr. justice DONOHUE in a civil suit for conversion, instituted in the supreme court by the Preston Banking Company of England. While in custody under this order, which fixed his bail at \$70,000, he was taken to the office of a United States commissioner, before whom proceedings were begun against him for his extradition to Great Britain upon a charge of forgery. While these proceedings were going on the relator appears to have been transferred to the custody of the United States marshal. He was finally discharged on *habeas corpus* by the circuit court of the United States on June 18, 1884; but was at once rearrested and taken to jail again by persons acting under the pretended authority of an instrument in writing indorsed upon a paper purporting to be an undertaking by bail in the civil suit in the state court.

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The prisoner knew nothing about this undertaking. It had been given to the sheriff without his knowledge or consent. It was executed by John Smith, who described himself as a stenographer, of No. 16 Marion street, and John Brady, Jr., of High Bridge. These gentlemen, both strangers to him, undertook to be responsible in the sum of \$70,000 for the submission of the defendant to final process in the action. They omitted to make the usual affidavits of bail as to sufficiency, but the undertaking was nevertheless satisfactory to the plaintiff's attorneys, who signed an indorsement thereon in the following words:

We hereby admit due service by the sheriff of a certified copy of the within undertaking of bail, and hereby approve said undertaking as to form and manner of execution, and accept the bail therein named.

Dated NEW YORK, *June 16*, 1884.

MARTIN & SMITH.

This instrument, thus executed and accepted, bore a further indorsement whereby Mr. John Brady, Jr., assumed to depute two persons in his place and stead to arrest and surrender Gerald T. Tully to the sheriff in exoneration of Mr. Brady as bail.

On the return to the writ of *habeas corpus* in the present proceeding, the sheriff certifies that he holds the relator by virtue of this "surrender in exoneration of bail," and also by virtue of the order of arrest granted by Mr. justice DONOHUE.

*Charles H. Luscomb*, for relator.

*M. W. Divine* and *A. P. Whitehead*, for the Preston Banking Company.

*Edward J. Cramer*, for the sheriff.

BARTLETT, *J.* — I think it perfectly clear that the alleged surrender by bail conferred no authority upon the sheriff or anybody else to take or hold the prisoner. The undertaking

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was a nullity so far as the prisoner was concerned. Strangers cannot be permitted to become bail for a man without his consent. The giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. They cannot be imposed upon him against his will. In the view of the law, a person who has been admitted to bail is at all times in the custody of his sureties, who may break into his house to retake him, and may even arrest him on Sunday, always holding him, as it were, at the end of a string. The controlling power of the bail over the principal is one which can be exercised at all times and in all places (*Nicolls agt. Ingersol*, 7 *Johns.*, 156). A prisoner is entitled to choose whether he will give any one else this dominion over him or will remain in the custody of the sheriff. According to Sir William Blackstone, the security for the appearance of a party arrested is called bail because the defendant is bailed or delivered to his sureties, "and is supposed to continue in their friendly custody, instead of going to gaol" (3 *Blackst. Com.*, 290).

In the present case it was asserted by counsel upon the argument, and not denied, that the sureties, Messrs. Smith and Brady, were respectively a stenographer and a clerk in the office of the plaintiff's attorneys. It would be a mockery to hold that the employes of a law firm engaged in prosecuting a person for an alleged conversion of \$70,000 could possibly be "friendly" toward the defendant. On the contrary, it is evident that they were agents in a scheme to injure the prisoner rather than benefit him by becoming his bail.

A slight effort was made to justify the giving of this remarkable undertaking by the argument that it was bail by the sheriff instead of to the sheriff, in other words that the sheriff having become liable to the plaintiff's attorneys for letting the prisoner out of his custody into that of the United States marshal, he thereupon gave this undertaking in his own behalf, and the plaintiff's attorney so accepted it. This argu

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ment is disposed of by reference to the undertaking itself, which is indorsed as follows:

I certify that the defendant in this action has been held to bail by me, pursuant to the order of arrest issued herein, and I further certify that the within is a true copy of the bail taken by me under the said order.

A. V. DAVIDSON, *Sheriff*.

It is hardly conceivable that the sheriff would speak of the bail as being "taken by me," if he thought he was giving bail himself.

I do not think that Messrs. Smith and Brady ever lawfully became the bail of Gerald T. Tully, or ever possessed any power to surrender him. The sheriff derives no authority to hold him, from any act done by either of these self-constituted sureties.

It is contended, however, in behalf of the plaintiff in the civil suit, that the transfer of the relator to the custody of the Federal authorities and the subsequent transaction in reference to the so-called bail bond, amount at most only to a voluntary escape; that the right of the sheriff to retake a prisoner on mesne process after an escape is well settled, and hence that the present detention of the relator is lawful.

I think these propositions are correct.

It is doubtful whether the sheriff could be held liable for an escape on allowing the United States marshal to take the relator during the pendency of the extradition proceedings, even against the wishes of the plaintiff in the civil action (*See Wilckens agt. Willet*, 1 *Keyes*, 521).

As to the pretended letting to bail of the defendant, it must be regarded as a nullity in all respects. If deemed ineffectual for purposes of surrender, it cannot be deemed valid to effect the prisoner's release by reason of the act of the plaintiff's attorneys in accepting the so-called bail. But assuming that there was a technical escape while the persons deputed to execute the surrender were conveying the prisoner to the jail, the sheriff had a right to retake him by virtue of

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the original order of arrest, which had not become *functus officio* (*Arnold* agt. *Steeves*, 10 *Wend.*, 193; *Bronson* agt. *Noyes*, 7 *Wend.*, 193). The order still remained valid process.

Under the old practice, if any one obstructed the sheriff in his efforts to retake a defendant after escape, an attachment would issue against the offender "the same as in all other cases of obstructing the execution of the process of the court" (*Graham's Practice*, 149).

My conclusion is that the relator is lawfully in custody by virtue of a mandate in a civil cause, notwithstanding the events which have occurred since his original imprisonment began, and that the proceedings must therefore be dismissed.

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SUPREME COURT.

ALBANY CITY NATIONAL BANK agt. THOMAS S. GAYNOR.

*Receiver — in supplementary proceedings — When court will not order judgment debtor to deliver real estate of such debtor to receiver — Judgment creditor must first exhaust his remedy under his execution.*

This court will not order a judgment debtor to deliver to a receiver, appointed in supplementary proceedings, the possession of real estate of such debtor upon which the judgment was a lien and which could have been sold under an execution before the receiver was appointed. The judgment creditor must first exhaust his remedy under execution.

*Albany Special Term, March, 1884.*

A RECEIVER appointed in supplementary proceedings applied for an order to compel the defendant to deliver to him the possession of a house and lot occupied by the defendant. The defendant had been the owner and occupant of the premises for many months prior to and since the recovery of plaintiff's judgment, and said judgment was, of course, a lien thereon. It appeared that the premises were incumbered by mortgages to several parties, but the defendant claimed not to its full

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value. The defendant insisted that the realty should have been sold on execution.

*Louis Dreyer*, for plaintiff :

I. The receiver is entitled to all of defendant's property and the court will order its delivery to him (9 *How. Pr.*, 136; 53 *id.*, 173; 16 *N. Y.*, 543). *a.* The receiver represents both the debtor and creditor (87 *N. Y.*, 155).

*Edward J. Meegan*, for defendant :

I. Where the judgment debtor is the owner of real estate so that the judgment becomes a lien upon it, no authority should be given to a receiver, appointed in supplemental proceedings under the judgment, to sell such real estate. The judgment creditor must exhaust his remedy under his execution and sell the real estate by sheriff's sale (*Petition of Inglehart*, 1 *Sheldon* [*Buff. Sup. Ct.*], 514; *Bunn* agt. *Daly*, 24 *Hun*, 526; *Tinkey* agt. *Langdon*, 13 *N. Y. Weekly Dig.*, 384). *a.* In the *Inglehart* case (page 515) it is said: "It was the established policy of that court (chancery) not to permit a receiver in such cases to sell the real estate of the judgment debtor in any case where it appeared that the lands were bound by the judgment, and no impediment existed to a sale under an execution issued upon the judgment. A sale by the receiver having no equity of redemption in the judgment debtor or his creditors, would defeat the object of the statute in protecting their interests" (See, also, *Riddle on Sup. Pro.* [2d ed., *addenda*], p. 23). *b.* The *Inglehart* case is sustainable on principle. It is against the policy of the law to punish a man for poverty merely, or to harass him because he is for a time unable to pay his debts. After the recovery of a judgment the creditor's remedy is to issue an execution, and the debtor's property, real or personal, sold and applied. The form of execution is given by section 1369 of the Code of Civil Procedure. The Code (*sec.* 1446) also provides that within one year after the sale of real property by virtue of an execution the defendant may redeem. The Code further provides for

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supplementary proceedings (*tit. 9, art. 1*) and for a receiver (*tit. 9, art. 2*); and before supplementary proceedings can be instituted the execution must have been returned unsatisfied (*Sec. 2435*). It is an established rule in the exposition of statutes that the intention of the law given is to be deduced from a view of the whole and every part of a statute taken and compared together (1 *Kent Com.* [12th ed.], 462). The Code system is complete: *First.* The judgment. *Second.* The execution, sale and redemption. *Third.* The supplemental proceedings. *Fourth.* The receiver. The courts should give effect to every section of the Code; and as it authorizes the sale of real estate on execution, and the benignant right of redemption is annexed, no other part of the same Code should be so construed as to defeat this right. *c.* Supplementary proceedings are a substitute for the ordinary creditors' bill, and the same rules prevail except where altered by the Code (*Riddle on Sup. Pro.*, 1; *Smith agt. Mahony*, 3 *Daly*, 285). Creditors' suits had their origin in the narrowness of the common-law remedies by execution, and were permitted to be brought in those cases where the relief by execution was ineffectual, as for a discovery of assets, to reach equitable and other interests not subject to levy and sale at law and to set aside fraudulent conveyances and obstructions. It is a necessary result, from the whole theory of creditors' suits, that jurisdiction in equity will not be entertained where there is a remedy at law (3 *Pom. Eq. Jur.*, sec. 1415). *d.* The receiver "is subject to the direction and control of the court out of which the execution was issued" (*Code*, sec. 2471). A second execution may properly issue analogous to the old practice of creditors' bill, although supplementary proceedings are pending (*Smith agt. Mahony*, 3 *Daly*, *supra*).

WESTBROOK, J. — The owner of a judgment which is a lien upon real estate seeks to obtain possession of the real estate through a receiver appointed in supplemental proceedings without a sale under the judgment. This cannot be done, for

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it would be a practical repeal of the statutes providing for the sale of real estate under a judgment. It is useless, however, to reason. *Bunn* agt. *Daly* (24 *Hun*, 526) and *Tinke* agt. *Langdon* (13 *N. Y. Weekly Dig.*, 384; *S. C.*, 25 *Hun*, 562) decide the exact question.

Motion denied, with ten dollars costs.

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### COURT OF APPEALS.

CLARENCE I. ANTHONY, appellant, agt. FRANCIS S. WOOD, respondent.

*Attachment—Bond, promissory note, &c., how attached—The title of the sheriff does not relate back to the time when he demanded the property—Code of Civil Procedure, sections 648, 649.*

A bond, promissory note or other instrument for the payment of money can be attached only by taking the same into the sheriff's actual custody. Leaving a certified copy of the warrant with the usual notice upon a person having in his custody a bond belonging to the defendant in attachment is ineffectual to attach such bond.

A delivery of the bond claimed to be attached does not relate back to the time of the service of the warrant so as to vest title in the sheriff from that date. Neither the obligor in the bond nor the sheriff can set up the fraudulent character of the transfer of such bond to an assignee in an action thereon.

The Code of Civil Procedure (*sec. 649, sub. 2*) has made no change by which bonds, promissory notes, &c., are subjected to the rules governing the attachment of goods and chattels, except as to the manner in which the attachment is effected (*Thurber* agt. *Blanck*, 50 *N. Y.*, 80; and *Castle* agt. *Lewis*, 78 *N. Y.*, 187, followed and approved; *Anthony* agt. *Wood*, 29 *Hun*, 280, reversed).

*Decided, June, 1884.*

In an action brought by Helen L. Hall against John P. Brooks, in the supreme court, Hall obtained an attachment against the property of Brooks, which was delivered to Peter Bowe, sheriff of the city and county of New York, for service.

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At the time the attachment issued Clark Brooks, an attorney, had in his possession a note and mortgage executed by defendant Wood belonging to John P. Brooks, which bond and mortgage were actually kept in the safe of another attorney, whose office was in the same building with the office of Clark Brooks. On receipt of the warrant of attachment one of Bowe's deputies served a copy thereof, with the usual notice, and also made special demand for the note and mortgage upon Clark Brooks, who refused to deliver the same to the officer. A few days after the service of the warrant the bond and mortgage were transferred to plaintiff by John P. Brooks, the same remaining, however, in the custody of Clark Brooks. Proceedings were instituted to compel the delivery of the note and mortgage to the sheriff (*see Hall agt. Brooks*, 25 *Hun*, 577; 89 *N. Y.*, 33), as a result of which they were delivered to the officer.

This action was brought by Anthony, the assignee of John P. Brooks, against the defendant Wood, to foreclose the mortgage, Bowe not being made a party. Bowe petitioned to be joined as a defendant, alleging that the title to the bond and mortgage was in him, by virtue of the proceedings under the attachment, and that the assignment to Anthony was fraudulent, and praying foreclosure and sale and that the proceeds be paid to him, to be held under the attachment. This motion was granted, and upon trial the court gave judgment in his favor. From this order and judgment the present appeal is taken.

FINCH, J.—If one proposition of the respondent is sound it settles in their favor every serious question raised on this appeal. That proposition is, that under the existing provisions of the Code of Civil Procedure a promissory note is made property capable of manual delivery, which may be levied upon so as to effect a lien upon the debt which it represents by taking it into the officer's actual custody, and that he may protect and defend that levy and lien by assailing as fraudulent

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a previous assignment or transfer to a third party. Under the earlier provisions of the Code a levy upon property capable of manual delivery, executed by taking it into the actual possession of the officer, invested him with right, in defense of his levy, to assail as fraudulent and void against creditors a previous assignment or transfer which threatened by its priority the security of the lien obtained (*Rinchey* agt. *Striker*, 28 *N. Y.*, 45). But this court also held, as to the levy permitted to be made upon choses in action, that the attachment reached and became a lien upon only such debts as at the time belonged to the debtor by a legal title, and for the recovery of which he could maintain an action at law, and, as a consequence, where before levy of the attachment he had parted with the legal title, even if with intent to defraud his creditors, there remained in him for their benefit only an equity which the attachment could not reach, and so the sheriff could not assail the transfer as fraudulent. The doctrine of *Thurber* agt. *Blanck* (50 *N. Y.*, 80), went to that extent and has been since approved (*Castle* agt. *Lewis*, 78 *N. Y.*, 137; *Wait on Fraudulent Conveyances*, sec. 86). These authorities establish that the sheriff in the case before us could not assail as fraudulent the transfer of the note and its collateral made prior to his asserted levy, unless their doctrine is made inapplicable by the change in the provisions of the Code (Sec. 649). Where the property sought to be attached is "capable of manual delivery, including a bond, promissory note or other instrument for the payment of money," the levy is now to be made "by taking the same into the sheriff's actual custody." This provision changed merely the mode of making the levy, but in no respect altered the inherent character of the property sought to be attached. If the note or bond has been transferred, however fraudulently, no lien by attachment is possible, and it is of no consequence that the mode of executing the process has been changed. The note is not turned into a chattel by the new provision. It remains a chose in action, and when the legal title is in the attachment debtor, the debt

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may be seized by taking the note or bond which is its evidence, but where the legal title has been transferred to a third party and is not in the debtor to be attached, the possession of the note by the officers under his warrant accomplishes nothing. On the assumption, therefore, that no levy was made until after the transfer of the note, the attachment gave the officer no right to assail or contest it. But it is claimed that the levy made by taking the note into the officer's custody relates back to the demand made by him upon Clark Brooks, who had the possession of the paper, and which occurred before the note was transferred. The warrant was issued May 28, 1881. On June second, the officer called upon Clark Brooks, who was the agent and attorney of the defendant and had the note in his custody locked up in a friend's safe, served upon him a certified copy of the warrant together with a copy of the affidavits, and demanded the note and bond and mortgage and certificate that he held then for the benefit of the defendant. Brooks refused. Thereupon he was ordered to submit to an examination, which took place on June seventh. The assignment of the note and mortgage was dated the day before, but recorded on the same day. In July a motion to compel Brooks to deliver up the note was denied at special term, but the order was reversed by the general term, which directed him to deliver up the securities to the sheriff. This he did under protest. It was said, in *Bills agt. National Park Bank* (89 N. Y., 351), to have been the law that a debt evidenced by a negotiable security could be attached while in the hands of the attachment debtor, by serving the attachment upon the maker of the security; but the effect of sections 648 and 649 of the Code of Civil Procedure was not considered. Section 649 prescribes how the levy shall be made. It must be "by taking the same into the sheriff's actual custody," who must "thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted." No other mode is prescribed. Nothing else will constitute the levy. Until

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the officer has obtained the actual custody, he has made no levy and can make none. He is armed with power to get such custody. He may proceed by action or special proceedings to reach that result; but until he has reached it he has made no levy and can make none. We have nothing to do with the wisdom of the rule. We can only enforce it as it is plainly written. It follows that neither before nor after the assignment did the sheriff acquire any title or lien upon the note in bond and mortgage; that he had no interest in the foreclosure or right to intervene, and that the judgment and interlocutory order appealed from should each be reversed and judgment of foreclosure ordered in favor of the plaintiff, with costs. All concur, except RUGER, Ch. J., not voting.

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### SUPREME COURT.

CHARLES A. MALLORY, appellant, agt. FREDERICK REICHERT  
(PETER BOWE, sheriff, &c.), respondent.

*Sheriff's fees — Plaintiff's right to demand taxation — Items not allowable.*

On a sale of goods by the sheriff on execution which realized \$3,488.39, the sheriff's bill amounted to \$1,151.45. The plaintiff demanded a taxation of the bill, and an order was made by the court on such taxation allowing to the sheriff the whole amount charged:

*Held*, that the plaintiff had a right to demand the taxation; that the court had authority to make it, and that inasmuch as a large number of the items of the bill should have been rejected, the order should be reversed and the proceedings remanded to the special term with a direction to proceed and tax the bill in conformity to the authorities cited.

*First Department, General Term, April, 1884.*

*Before* DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order of the special term taxing sheriff's bill on execution.

*R. W. Hawksworth*, for appellant.

*Knox & McLean*, for respondent.

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Mallory agt. Reichert.

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DAVIS, *P. J.* — The execution in the suit of *Mallory agt. Reichart* was issued to the sheriff, and by him levied upon the stock of goods of the defendant Reichert. On the subsequent sale of the goods they produced the sum of \$3,488.39. The sheriff's bill, presented and claimed by the deputy, one Mark L. Frank, who had the execution in charge, amounted to \$1,151.45. The plaintiff demanded a taxation of the bill, and on his motion it was taxed at special term, each party presenting a number of affidavits in relation to the several items charged. An order was made on such taxation allowing the sheriff the whole amount charged, to wit, \$1,151.45. From that order the plaintiff appeals. The counsel for the sheriff do not pretend to defend the taxation of this bill on any legal or other ground. On the contrary they say: "We will not attempt to impose upon the court since the decision in *McKeon agt. Horsfall* and *Woodruff agt. Imperial Fire Company*, by insisting that all of these items are taxable if the court shall assume that a taxation, properly so called, was before it." They, however, undertake to claim that the taxation was one not authorized by law, and therefore that this court must either treat the proceedings as a mere arbitration and leave the parties in the position in which they have placed themselves thereby, or as wholly *coram non judice* and a proceeding without jurisdiction, and dismiss the appeal without prejudice to an action.

The bill on its face is one which could not be sustained even on the affidavits presented on behalf of the sheriff alone. For no court should allow, for instance, that the sheriff could employ under any circumstances twenty-one keepers at a time to watch over a stock of goods consisting chiefly of empty paper boxes, especially after the court of appeals have decided that no charge for keepers can be taxed (*McKeon agt. Horsfall*, 88 *N. Y.*, 429).

We think, under the statute, the plaintiff had a right to demand the taxation. The money had been made on the execution and was in the hands of the sheriff. The plaintiff was

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Mallory agt. Reichert.

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entitled to have it paid to him, less the sheriff's legal fees and charges, and although the statute, in speaking of taxation, uses the words "upon being required by the defendant," we are of opinion that, under the circumstances, the plaintiff in the execution occupied that relation as between himself and the sheriff in his effort to defend himself against extortion. In *O'Connor* agt. *O'Connor* (47 *Supr. Ct. R.*, 500), a case quite analogous with the present in its facts, the taxation was made on motion of the plaintiff.

In this case the motion for taxation was not made to "any judge or officer of the court," but to the court itself, sitting at special term; and we see no reason why it should not be held that, under its general jurisdiction over all actions pending in the court, and after process issued therein, the special term as such had not authority to make the taxation in question. Neither party raised any question, as would seem, at the hearing, of any want of power in the court.

The order taxing the bill at the full amount claimed is in direct conflict with all the authorities of which we have any knowledge, and especially of *Crofut* agt. *Brandt* (58 *N. Y.*, 106), *O'Connor* agt. *O'Connor* (47 *Supr. Ct.*, 500), *Lord* agt. *Richmond* (38 *How. Pr.*, 173), *McKeon* agt. *Horsfall*, 88 *N. Y.*, 429), *Woodruff* agt. *Imperial Fire Insurance Company* (90 *N. Y.*, 521). Under these authorities large numbers of the items of the bill should have been rejected.

Inasmuch as the bill presented has received in point of fact no taxation or consideration of its items, we do not think it our duty to go through and determine what should or what should not have been allowed. The proper disposition of the case seems to us to be to reverse the order, with costs of appeal to the appellant, and to remand the proceedings to the special term with directions to proceed and tax the bill in conformity to the several authorities above cited.

Ordered accordingly.

DANIELS and BRADY, JJ., concur.

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Leonard *et al.* agt. Kingsland.

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N. Y. COMMON PLEAS.

JANE MARIA LEONARD *et al.* agt. SOPHIE KINGSLAND.

*Will — Construction of — Devise to a person with remainder over in case of his death — Meaning of.*

The testator by his will devised his residuary estate to one of his sons and to his heirs; but if he died without issue, then to the testator's remaining children.

*Held*, that the contingency of the death of the son meant his death during the lifetime of the testator, and the contingency never having happened, the residuary estate vested in him absolutely.

*General Term, July, 1884.*

*Before C. P. DALY, P. J.; LARREMORE and BEACH, JJ.*

DALY, C. J. — The contingency referred to in the will of Daniel Kingsland, the elder — the death of Daniel Kingsland, the younger — meant his death during the lifetime of the testator, and as he survived the testator, the contingency provided for never happened, and the residuary estate vested in him absolutely.

When a devisee or bequest is made to a person, with a remainder over in case of his death, it is the general rule of construction that what is meant is his death during the lifetime of the testator. The testator having in contemplation the disposition to be made of his property at the time of his death, it is assumed, in the absence of anything in the will to the contrary, to have been his intention to make provision for a contingency that might happen between the time of making the will and that event. Where, therefore, a remainder over is provided for in case of the death of a devisee or legatee the will is, as I have said, construed to mean his death during the lifetime of the testator, unless there are controlling provisions in it, or from the whole tenor of the will, it is evident that the intention was otherwise (*Livingston agt. Green*, 52

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*N. Y.*, 124; *Cambridge* agt. *Rous*, 8 *Ves.*, 21; *Emory* agt. *Sheldon*, 68 *N. Y.*, 233; *Kelly* agt. *Kelly*, 61 *id.*, 50; *Moore* agt. *Lyons*, 25 *Wend.*, 119; *Lowfield* agt. *Stoneham*, 2 *Strange*, 1261; *Rose* agt. *Hill*, 2 *Burr*, 881; *Schoonmaker* agt. *Stockton*, 37 *Penn. St.*, 461; *Hinckley* agt. *Simons*, 4 *Ves.*, 160; *Trotter* agt. *Williams*, *Pre. Ch.*, 78; *S. C.*, 2 *Eq. Cas.* [*Abb.*], 344, *pl.* 2; 2 *Jarman on Wills*, *chap.* 49 [2d *Am. ed.*], *pp.* 468, 469, 500; 1 *Roper on Legacies* [2d *Am. ed.*], *pp.* 607, 608).

The reason of this rule is in part as above stated, but in addition to this, the law will never construe a remainder to be contingent, when the estate can be taken to be vested, the policy of the law being to construe estates as vested instead of contingent when there is any doubt (*Moore* agt. *Lyons*, 25 *Wend.*, 126, 152).

Slight circumstances may suffice to show the intention, as in *Douglas* agt. *Chalmers* (2 *Ves. Jr.*, 501) in which so slight a circumstance as the bequest of the testatrix's finest diamond ring, in the codicil of the will, was regarded as inconsistent with the supposition of the legatee's taking the whole interest in the residue, whilst if she took it for life only it was very natural.

The construction which makes the words "in case of death," &c., provide against the event of the legatee's death in the lifetime of the testator applies only where the prior gift is absolute and unrestricted, and not where the legatee takes a life interest only, for in the latter case it is assumed that the death referred to is the death that puts an end to the life estate; or, to express it differently, this construction applies only where the legacy is immediate, but made defeasible on the death of the legatee" (1 *Roper on Legacies*, 607; 2 *Jarman on Wills*, 666, and cases cited in both works). There are a few cases, says Jarman, of immediate bequests in which the words under consideration have been construed to refer to death at any time, and not to the contingent event of death, in the lifetime of the testator; but in each, he says, there

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Leonard *et al.* agt. Kingsland.

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seems to have been some circumstances evincing an intention to use the words in that rather than in the ordinary sense (2 *Jarman*, 660).

In this case there are none. The prior devise to Daniel Kingsland, the younger, is immediate. It is to him and "to his heirs," but defeasible upon his death. This is not only the case, but the property left to the remaining three children of the testator is left to them for their natural lives only, and, at their deaths, to their children, if they have any, and, if not, to other persons who are designated. There is, therefore, in this will, an immediate and absolute devise to Daniel, defeasible only as has been stated, and separate life estates in each of the testator's other children, a distinction that is very material in the construction of the will as tending to show that if it had not been his intention that Daniel, if he survived him, should have the residuary estate absolutely, he would have so expressed it, and given him, like the other children, a life estate only. The will, moreover, in the apt use that is made in it of technical terms, and the general structure of it, denotes that it was prepared by a professional person, who, it may reasonably be assumed, was acquainted with the rule, as it is well established, that where the contingency of the death of a legatee is provided for, the construction of the law is his death during the lifetime of the testator, unless there are provisions denoting the contrary, and this is a circumstance entitled to weight where no provisions have been inserted expressing a contrary intention (*Moore agt. Lyons*, 25 *Wend.*, 119).

In one of the earliest cases in which this question arose (*Lowfield agt. Storeham*, 2 *Strange*, 1261), the devise was "to my loving brother; and in case of his death, to his wife;" and it appearing that the brother survived the testator, it was held that the legacy vested in him at once on the death of the testator. And in one of the most recent cases (*Emory agt. Sheldon*, 68 *N. Y.*, 227), the rule was applied under circumstances not unlike the case now before us.

In that case there was a life estate during the lifetime of

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the wife, and afterwards, during the lifetime of a son, upon whose death the trustee created ceased, and by the will, the residue and remainder of the estate was left to three other children in equal parts, but in the event of any one of them dying, leaving lawful issue surviving, the issue was to take the share which the parent would have taken if living; and should no lawful issue survive, the share of the one dying went to others who were designated. One of these three persons was Daniel Emory. He did not take directly like Daniel Kingsland, the younger, but took a proportional part of the residuary estate after the trust estate ceased. He survived the testator and had a child born after the testator's death. The question was raised whether the death referred to in the will meant a death before or after that of the testator; and there being no controlling provision showing a contrary intention, it was held that the will, according to the recognized construction applicable to wills, referred to a death happening in the lifetime of the testator; and as Daniel Emory survived the testator, that he took upon the death of the latter an absolute, indefeasible estate in remainder expectant on the final termination of the trust term.

In the application of this rule I can see no substantial difference between that and the present case. There the devise was to Daniel Emory, or in the event of his death, to his lawful issue, &c. Here it was to Daniel Kingsland, the younger, "and to his heirs; but if he died without issue, then to the testator's remaining children; and if, in the former case, the remainder vested absolutely in Daniel Emory, on the death of the testator, an estate in fee must also have vested absolutely in Daniel Kingsland, the younger, on the death of his father.

This being the construction of the will, and the residuary estate having passed, upon the death of the testator, to Daniel Kingsland, the younger, in fee, the plaintiffs take under his will, and not under that of Daniel Kingsland, the elder, and have no cause of action, the property, 40 Stuyvesant street,

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Fellows agt. Lane.

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having been transferred by Daniel Kingsland, the younger, in his lifetime, to his wife, the defendant.

The judgment of the special term therefore should be reversed.

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## COURT OF SESSIONS.

GEORGE A. FELLOWS, overseer, &c., agt. PETER LANE.

*Costs—Awarded in a bastardy case pursuant to section 878 of the Criminal Code—By whom to be taxed.*

The prevailing party in a bastardy case is entitled to taxable costs and no others. And where costs are awarded to plaintiff pursuant to section 878 of the Criminal Code, such costs should be taxed by the clerk.

*Monroe county, September, 1884.*

APPLICATION to the court to tax costs in a bastardy case.

*W. P. Chase and T. L. Hulburt, for plaintiff.*

*S. B. McIntyre, for defendant.*

MORGAN, Co. J.—The defendant having been held by two justices as the putative father of a bastard child, appealed to this court, where the order of the justices was affirmed and costs were awarded to the plaintiff, pursuant to section 873 of the Criminal Code. The plaintiff thereupon makes this application to the court to adjust and fix the amount of the costs. The defendant objects that the costs should not be taxed by the court but by the clerk. I think the objection is well taken. The only case to which my attention has been called is *Superintendent, &c., agt. Moore* (12 *Wend.*, 273), in which the costs were taxed by “three of the judges of the county courts” of the county. The provision of the statute (1 *R. S.*, 649, *sec.* 37) in force at the time of that case (1834), was substantially the same as that of section 873 of our present Code, and the court there held that the prevailing

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Matter of Lynch.

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party was entitled to taxable costs and no others. But the fact that they were then taxed by three of the then somewhat numerous "judges of the county courts of the county," is no proper precedent for a taxation of costs by the judges of the court now, because although they then, as now, held or could hold the "court of general sessions," still at that time costs were taxed in the common pleas (which corresponded to our present county court) by the "first judge of the county or by some other judge of such county, being of the degree of counselor in the supreme court; and in case of the absence of the judges so authorized, by the clerk of the court" (2 *R. S.*, 282, *sec.* 35), whereas now costs in civil actions "must be taxed by the clerk upon the application of the party entitled thereto" (*Code Civil Pro.*, *sec.* 3262). There is now no other officer authorized by statute to tax costs in any action except the clerk. Inasmuch, therefore, as the court held in *Superintendents agt. Moore* (*supra*), that the word "costs" in the statute meant the costs of a civil action, it seems to me that the taxation should follow in the same manner and be attended to by the same officer.

The application is therefore denied.

JAMES C. BAIRD and WILSON W. BROWN, sessions justices, concurred.

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SUPREME COURT.

In the Matter of JOHN LYNCH.

*Surrogates — Their power over sales of real estate ordered by them.*

Surrogates have power to compel a purchaser of real estate to take or to discharge a purchaser from taking.

*Second Department, General Term, September, 1884.*

*Joseph Fetteretch and Thomas Cook, for purchaser and appellant.*

*F. E. Blackwell, for executor and respondent.*

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Matter of Lynch.

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DYKMAN, J. — George Wolfe became the purchaser of certain real property sold by John Lynch, as executor under an order of the surrogate, for the payment of the debts of his decedent. His bid was \$5,325, and he paid down \$532.50 for ten per cent thereof and twenty dollars auctioneer's fee, besides \$105, which he had paid for a search against the property. The examination of the title disclosed some irregularities in the proceeding which led up to the surrogate's order of sale, and also an order of the bureau of inspection of buildings of the fire department in the city of New York requiring the owners of the buildings on the premises to remove them.

On the discovery of these difficulties Wolfe presented his petition to the surrogate disclosing them all, and asked to be relieved from his purchase and have the money refunded which he had paid out. The surrogate refused to entertain the proceedings and denied the application on the ground that he possessed no power or jurisdiction to grant any relief. The question for us, therefore, relates to the power of the surrogate to entertain the proceedings and grant the desired relief.

The application is for an order directing the executor, over whom the surrogate has full control, to repay money he has received in virtue of his office while acting in obedience to an order of the surrogate. In this examination it matters not whether the application is meritorious or otherwise, or whether the facts set out in the petition are true or untrue; that must be determined by the surrogate, provided he entertains the application.

Surrogates have power to direct the disposition of real property and interests in real property of decedents for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof (*Code of Civil Procedure, sec. 2472, sub. 5*). They may also exercise such incidental powers as are necessary to carry into effect the powers conferred expressly (*Code, sec. 2481, sub. 11*). These provisions clothe those officers with powers to make to all necessary orders to carry

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Farley agt. Norton.

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into effect their decrees of sale, and at least to compel an executor to execute a deed in consummation of his sale or to pay back to a purchaser his deposit paid at the sale. This seems to be sufficiently clear under the provisions of the Code of Civil Procedure, even if it was not so before, and the view is sustained by the court of appeals (*In the Matter of Dolan*, 88 N. Y., 309).

The order of the surrogate should be reversed and the proceedings remitted to his court, with directions to entertain the application and administer the proper relief. Costs to be paid out of the estate.

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### CITY COURT OF NEW YORK.

PATRICK FARLEY agt. PATRICK NORTON, as surviving partner.

*Evidence — Statements of deceased partner inadmissible as evidence against surviving partner.*

Conversations between plaintiff and a deceased partner are inadmissible as evidence against the surviving partner.

*Special Term, September, 1884.*

MOTION for a new trial.

*Samuel Greenbaum*, for motion.

*E. P. Wilder*, opposed.

McADAM, C. J. — The action was brought to recover an amount said to be due to the plaintiff for goods sold and delivered to the late firm of Norton & Golden. The action is in form against Patrick Norton, as surviving partner of that firm, but upon the trial it appeared that he was not a member of the firm, although by reason of his acts liable to third persons as if he had been a member thereof. It was upon this theory that the plaintiff was allowed to testify to conversations with Goldon in which the latter ordered the goods for

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Terry agt. New York Central and Hudson River Railroad Company.

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his firm. Upon first impression it would seem that the rule excluding conversations or transactions with deceased persons was for the protection of their estate, and that their legal representatives only could take the objection which would prevent the reception of such evidence. But upon examination it has been discovered that the court of appeals has decided that the objection may be legally taken by a surviving partner (*Green agt. Edick*, 56 *N. Y.*, 613), while, as before remarked, the defendant is not technically a surviving partner (not being a member of the firm), yet the complaint charges that in legal effect at least he was surviving partner and the plaintiff is concluded by his pleading.

It may be also said that there is evidence enough in the case outside of the conversations with Golden to sustain the verdict, such as proof that the goods were delivered and that Norton promised to pay the bill, and it may be argued that the admission of the evidence complained of was at most a harmless error. Be this as it may, the only certain mode of curing the error complained of is by ordering a new trial.

The motion will therefore be granted, no costs.

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## SUPREME COURT.

LYMAN TERRY agt. THE NEW YORK CENTRAL AND HUDSON  
RIVER RAILROAD COMPANY.

*Railroads — Real estate taken for railroad purposes — When use for which land is taken not limited in time — What time such use shall continue within the discretion of the legislature.*

When the Tonawanda railroad, extending from Rochester to Attica, was organized, it obtained a charter extending over a period of fifty years. Under this charter and by virtue of the statute, it condemned and took a strip of land running through the plaintiff's farm. Subsequently the road was consolidated with several others, and became the New York Central and Hudson River road, and has ever since continued to use this strip as a part of its roadway. The charter of the New York

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Central and Hudson River Railroad Company was granted for half a century. The original charter of the Tonawanda railroad has expired and plaintiff brings suit to eject the railroad company and recover possession of the land, claiming that with the expiration of the charter the land no longer belonged to the railroad company:

*Held*, that the public use for which the lands were originally taken is still continued, and such use was not limited in time. Although the corporation was at first created only for the term of fifty years, yet the legislature reserved to itself the right at any time to alter, modify or repeal the act.

*Held*, further, that whilst the plaintiff is the owner in fee of the lands in question, it is subject to a public use by the defendant for railroad purposes, and that the time that the use shall continue is within the discretion of the legislature, and that as the legislature has seen fit to authorize its consolidation with other corporations and to extend its corporate term for the period of five hundred years, such use has not as yet ceased and determined, and consequently the plaintiff cannot recover.

*Genesee Circuit, September 1884.*

TRIAL before the court without a jury.

*George Bowen*, for plaintiff.

*George C. Greene*, for defendant.

HAIGHT, J.—This is an action of ejectment brought to recover certain lands occupied by the defendant.

The Tonawanda Railroad Company was incorporated by chapter 241 of the Laws of 1832 for the term of fifty years from the passage of this act. It was authorized to construct and maintain a railroad with such appendages as may be deemed necessary from a point within the village of Rochester, in the county of Monroe, through the Tonawanda valley to the village of Attica in the county of Genesee. The corporation organized under this act in the year 1836 instituted proceedings in the court of chancery for the condemnation of the lands in question, and such proceedings were thereupon had; that commissioners of appraisers were appointed and did appraise the damages that the then owner

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sustained by reason of the appropriation of the lands in question, and the same was confirmed by the court. That thereupon the railroad company entered into possession and ever since has continued to use and occupy the same for railroad purposes.

On the 8th day of October, 1850, an agreement of consolidation was entered into between the Tonawanda and the Attica and Buffalo Railroad Companies, pursuant to an act of the legislature passed April 9, 1850, authorizing the companies to consolidate and form a new corporation. The new corporation formed under this act and the agreement of consolidation was known as the Buffalo and Rochester Railroad Company. Under the provisions of the act all and singular of the property, franchises and rights of each of the companies were transferred to and vested in the new corporation.

On the 17th day of May, 1853, another agreement of consolidation was made between the Buffalo and Rochester Railroad Company and other companies forming the New York Central Railroad Company. This agreement was made pursuant to an act of the legislature passed April 2, 1853, authorizing the consolidation of such companies and providing for the transfer of the property and franchises of the various companies and the vesting of the same in the new company so organized.

On the 15th day of September, 1869, still another agreement of consolidation was entered into between the New York Central Railroad Company and the Hudson River Railroad Company, by which the New York Central and Hudson River Railroad Company was organized pursuant to chapter 917 of the Laws of 1869, and the property and franchises of the former companies were vested in the latter. Under and by virtue of the various agreements of consolidation referred to by the legislature, the property and franchises of the Tonawanda Railroad Company is now vested in the defendant,

It is claimed on the part of the plaintiff that the Tonawanda Railroad Company was only chartered for the term of fifty

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years; that the land in question taken under the proceedings before the chancellor was only taken for the lifetime of the corporation; that the fifty years have now expired, and that the land reverts to the owner or his grantees.

There is no dispute about the facts. The question presented is one of great importance, and is not free from difficulty. It involves the right to the possession to all the lands in the state taken under the right of eminent domain by the railroads originally chartered for fifty years.

It is well settled that lands taken for railroad purposes are taken for a public use. It now becomes necessary to determine whether lands once appraised and devoted to a public use will revert to the owner so long as the public use is continued.

Section 1 of the act of incorporation of the Tonawanda Railroad Company creates the corporation and provides that "it shall be, and for the term of fifty years from the passage of this act, shall continue to be a body corporate and politic."

Section 16 of the act provides that "it shall be lawful for the said corporation to appropriate so much of such lands as may be necessary to its use for the purposes contemplated by this act on complying with the provisions of the six following sections." The six following sections provided for the presenting of a petition to the vice-chancellor for the appointment by the chancellor of appraisers, for the appraisal of the lands and for the confirmation thereof by the court. Section 22 provides that "on the payment of the damages thus assessed, together with the expenses of the assessment, the said corporation shall immediately become entitled to the use of the said lands for the purposes aforesaid." Section 28 provides that if the legislature of the state shall at the expiration of ten and within fifteen years make provision for the re-payment of the company of the amount expended by it, etc., that then the railroad with all of its fixtures and appurtenances shall vest in and become the property of the people of the state. Section 30 provides that "the legislature may at any time alter, modify or repeal this act."

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Terry agt. New York Central and Hudson River Railroad Company.

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The court of appeals in construing chapter 256 of the Laws of 1832, which is an act incorporating the Brooklyn and Jamaica Railway Company, and is substantially a copy of the act under consolidation, held that by the proceedings for the acquisition of lands for the railroad company the company became entitled to the use of the land for the purpose of operating its road; that the fee remained in the original owners, subject only to that use, and on the discontinuance of the use the owners were entitled to resume possession of the land (*Heard* agt. *The City of Brooklyn*, 60 *N. Y.*, 242; *Strong* agt. *The City of Brooklyn*, 68 *N. Y.*, 1). In these cases the lands had been acquired by proceedings under the statute for railroad purposes. The railroad company subsequently conveyed a portion of the lands so acquired to the city of Brooklyn for the purpose of enabling the city to open and lay out a street thereon. The court further held that the railroad company having ceased to use the land for railroad purposes, that the owner was entitled to re-enter and regain possession. The reasons of these decisions will become apparent when we come to examine the provisions of section 20 of the act. It provides that "the persons appointed to assess the damages shall ascertain and assess the damages which each individual owner will sustain by the appropriation of his land for the use or accommodation of such railroad or its appendages, and in assessing such damages the appraisers shall take into the account the benefit which will accrue to such owner by means of the passage of the said railroad through his land."

This act contemplates a benefit to be derived by the landowner by having a railroad constructed, and that the benefits to be derived therefrom are to be taken into consideration in determining the amount of damages that should be awarded to him. In this way the landowner is to pay for the benefits derived. Having paid for the same he is then entitled to have his lands used for railroad purposes. In other words, he is entitled to have the lands devoted to the public use for which they were taken, and as soon as that use ceases or is

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determined he is entitled to re-enter and regain his lands. The case under consideration, however, is distinguishable from these cases decided in the court of appeals. In those cases the public uses for which the lands were taken had ceased and the railroad company had abandoned the land. In this case the public use for which the lands were originally taken is still continued. It thus becomes necessary to determine whether or not the use for which the lands were originally taken was limited in time. The corporation was at first created only for the term of fifty years. The legislature, however, reserved to itself by section 30 the right at any time to alter, modify or repeal the act. It thus had power to shorten or extend the term that the corporation should exist. The legislature has seen fit to authorize its consolidation with other corporations and to extend its corporate term for the period of 500 years. If, therefore, the lands were taken under this act for the lifetime of the corporation, subject to the power of the legislature to shorten, discontinue or extend such corporate life, then I fail to see how the plaintiff can recover. Were the lands so taken? In determining this question the act must be construed as a whole. The purpose and intent of the legislature must be determined by reading the various sections of the act in connection with each other. Section 1 creates the corporation for fifty years, but by section 30 the time may be lengthened, shortened or the corporation at any time discontinued. So that it is the same as if section 1 read, that the corporation shall be, and for the term of fifty years from the passage of this act, or such other term as the legislature shall provide, shall continue to be a body corporate and politic. Section 16 in giving authority to acquire and appropriate lands provides that it may do so "for the purpose contemplated by this act." And section 22 in providing that the railroad company may take possession of the land after payment of the damages as appraised, provides that it shall be entitled to the use of the said lands for the purposes aforesaid. The purposes aforesaid are the purposes contemplated

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Potter agt. Frail.

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by this act, and the purposes contemplated by this act are to construct and maintain a railroad from the village of Rochester, in Monroe county, to the village of Attica, in the county of Genesee, for the term of fifty years, or for such other term as the legislature shall provide.

My conclusion is, that whilst I find the plaintiff to be the owner in fee of the lands in question, it is subject to a public use by the defendant for railroad purposes, and that the time that that use shall continue is within the discretion of the legislature; that such use has not as yet ceased and determined, and, consequently, the plaintiff cannot recover.

Judgment ordered for the defendant.

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## SUPREME COURT.

DIANA POTTER agt. ELMER FRAIL and ARTHUR BURNS.

*Answer — Denial in, when insufficient — Code of Civil Procedure, section 500.*

A denial in an answer as follows: "Defendant denies each and every allegation, averment and statement of the complaint, except such as are hereinafter admitted, qualified and explained," is bad whenever the objection is raised by demurrer or special motion.

*Cortland Special Term, May, 1884.*

*Robert T. Johnson, for plaintiff.*

*Edwin D. Wagner, for defendant.*

FOLLETT, J. — The plaintiff moves for an order correcting the answer upon the ground that the denials interposed are not authorized by Code of Civil Procedure (*sec. 500*). The answer "denies each and every allegation, averment and statement thereof, except such as are hereinafter admitted, qualified and explained."

If any rule of pleading can be settled by legislative enactment, and by a long line of judicial decisions, it must be regarded as settled that a denial in this form is bad whenever

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the objection is raised by demurrer or special motion (*Code Civil Pro.*, sec. 500; *People* agt. *Northern R. R. Co.*, 53 *Barb.*, 101-122; *affirmed*, 42 *N. Y.*, 217; *People* agt. *Snyder*, 41 *N. Y.*, 400; *Chamberlin* agt. *The American National Life and Trust Co.*, 5 *N. Y. W. Dig.*, 128; *Hammond* agt. *Earle*, 5 *Abb. N. C.*, 105; *McEncroe* agt. *Decker*, 58 *How.*, 250; *Bixby* agt. *Drexel*, 9 *Reporter*, 630; *Miller* agt. *McClosky*, 1 *N. Y. Civil Pro. R.*, 252; *S. C.*, 9 *Abb. N. C.*, 303; 13 *N. Y. W. Dig.*, 51; *Clark* agt. *Dillon*, 4 *N. Y. Civil Pro. R.*, 245; *S. C.*, *McCarty*, 73; *Leary* agt. *Boggs*, 3 *N. Y. Civil Pro. R.*, 227; *Scott* agt. *Royal Exc. Shipping Co.*, 5 *Monthly L. B.*, 64; *Luce* agt. *Alexander*, 4 *N. Y. Civil Pro. R.*, 428; *Pomeroy's Remedies and Remedial Rights*, secs. 633-636; *Moak's Van Santvoord's Pleadings*, chap. 5, sec. 2).

*People* agt. *Northern Railroad Company*, *Clark* agt. *Dillon*, *Bixby* agt. *Drexel* and *Luce* agt. *Alexander* arose on judgments ordered for the plaintiffs on the ground that such a denial did not put in issue the allegations in the complaint. The other cases arose on special motions, applications for injunctions, receivers, &c. In justification for this form of miscalled general denial the following cases are often cited, but they do not sanction the practice when the objection is raised before trial (*Allis* agt. *Leonard*, 46 *N. Y.*, 688, *reported in full* 22 *A. L. J.*, 28; *Hallan* agt. *Calhoun*, 25 *Hun*, 155; *McGinnis* agt. *The Mayor*, 13 *N. Y. W. Dig.*, 522; *also reported, but not on this point*, 26 *Hun*, 142; *Burley* agt. *German American Bank*, 5 *N. Y. Civil Pro. R.*, 172). In these cases the objection was raised on the trial on motion for judgment, or by objecting to evidence, and they are in accordance with *Greenfield* agt. *Massachusetts Mutual Life Insurance Company* (47 *N. Y.*, 430).

In *Haines* agt. *Herrick* (90 *Abb. N. C.*, 379) the distinction between the cases was not observed. The Code seems to be so plain in this respect as not to require elucidation. A general denial is proper only when the whole complaint, or if the

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complaint contains more than one cause of action, when one of the counts or causes of action can be wholly denied. A specific denial is proper when the complaint, or one of the causes of action, cannot be wholly denied, in which case such portions of the complaint may be denied as can be, and the remainder stand admitted by the failure to deny.

After the denials, new matter, if any, constituting a defense or counter-claim should be set forth. New matter constituting a defense is that which avoids or discharges the cause of action alleged in the complaint (*Stoddard* agt. *Onondagu, &c.*, 12 *Barb.*, 573; *Bell* agt. *Yates*, 33 *Barb.*, 629; *Pomeroy's Remedies and Rights*, secs. 690 to 692.) Mitigating circumstances, if any, tending to reduce damages should then be set forth, and "expressly stated to be a partial defense" (*Code Civil Pro.*, secs. 508, 536, 3343, *subd.* 9).

These are plain rules, easily understood, but often disregarded, to the great hindrance of justice, unnecessarily protracting trials, and rendering the application of supreme court rule No. 20 impracticable. The general denial is stricken out.

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SUPREME COURT.

In the Matter of the Several Accountings of the Executors of  
WILLIAM TILDEN, deceased.

*Accountings of executors—Power of surrogates to vacate decrees in final accountings—General term of supreme court same power—Code of Civil Procedure, section 2481—When service of citation irregular—Power of surrogate to appoint guardians ad litem upon final accountings—Duty of such guardians—When decrees made upon final accountings will be opened and a rehearing ordered.*

The surrogate has power, under section 2481, Code of Civil Procedure, to open, vacate or set aside decrees in final accountings of executors. The general term of the supreme court has the same power, and the surrogate's determination must be reviewed as if the application were original.

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Want of time in the service beyond the seas of a citation out of the surrogate's court makes such service irregular.

The surrogate had, previous to 1874, an inherent authority to appoint guardians *ad litem* to look after the interest of next of kin, who are minors, upon final accountings by executors, and it is the duty of such guardian *ad litem* or special guardian to make special investigation into the accounts of such executors for the proper protection of the minor's interests.

A clause in the testator's will, "with liberty to pay over the rents, &c., of the infant's one-fourth of the estate to the widow, the general guardian," cannot be construed so as to allow executors to make payment of said rents, &c., to the infants direct, and then to take the widow's receipt as authority for these payments.

An agreement between testator's heirs regulating the rights of each and releasing several from claims for over advances by executors to such heirs, does not relieve an executor from liability for the management of the testator's personal estate.

*First Department, General Term, March, 1884.*

*Before BRADY and DANIELS, JJ.*

APPEAL from an order of the surrogate of the county of New York, denying the application of Beverly B. Tilden to open decrees made upon accountings of the executors of the estate and for a rehearing of such accountings so far as they affect the rights of the petitioner.

*William S. MacFarlane, for appellant.*

*C. E. Tracy, for executors.*

DANIELS, J. — The testator William Tilden, died on the 26th day of June, 1869, leaving a large real and personal estate to be disposed of according to his will and codicils. They were admitted to probate by the surrogate of the county of New York on or about the 19th of July, 1869, and letters testamentary were issued to four persons named in the will as executors. Another person was added as executor early in the year 1870, and a change was also afterwards made in that year by substituting one other person in place of one of the

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original executors who had died, and a similar change was made as to another in 1877. At the time of the decease of the testator, the petitioner was near the age of eleven years, he having attained his majority on or about the 10th of December, 1880. During his minority four accountings were had by the executors of the estate. The first in February, 1872; the second in the summer of 1874; the third in the spring of 1877, and the fourth in the spring of 1880.

The petitioner claimed, in support of his application, that improper charges had been made and allowed against him on each of these accountings. He also claimed that the executors had failed to enforce the guaranty of William Tilden Blodgett of second mortgages received by them in partial settlement of a large indebtedness in favor of the estate against him. If he was probably right in the complaints made by him, ample authority was given by subdivision 6 of section 2481 of the Code of Civil Procedure to the surrogate to open, vacate or set aside the decrees, so far as that might be necessary for the further examination of the items to which the application was directed, and upon appeal from the determination of the surrogate, *the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed as if an original application was made to that term.* Under this authority the entire controversy presented by the petition and the answer to it, is to be considered upon the appeal in the same manner in which the surrogate himself had the authority to consider it. In partial support of the allegations made, it was alleged and shown that no special guardian, or guardian *ad litem*, was appointed by the surrogate to take charge of the interests of the petitioner on the first accounting. His mother had been appointed by the testator's will his testamentary guardian, but they were in Germany when the citation was issued on the application of the executors, and it was served probably irregularly, at least for want of time (3 *R. S.* [6th ed.], 102, sec. 76), upon himself and his mother in that country. Neither she nor any other

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party in any form appeared for him on the accounting to investigate or protect his interests. On the second accounting it is recited in the decree that a special guardian for this purpose was appointed by the surrogate, and a similar statement is contained in the decree on the third accounting, and on the fourth a guardian was appointed on the petition of the appellant himself. But it is alleged in his behalf that neither of these persons undertook or made any special investigation of his interests.

And as to the guardians on the second and third of the accountings, there seems to be good reason to believe that these charges of inattention made by him are well founded. Upon the fourth accounting the guardian has sworn that he did inform himself of all the facts bearing on the interest of the infant, for the period included in such accounting, from every source which seemed to him to be available. But that he resisted any of the charges made against his ward in the accounts has not been stated by him. Neither does the case made in his behalf, or in behalf of the executors, show that any special investigation took place at any time before the surrogate relative to the charges now complained of as improperly allowed to the executors. It has been urged, as chapter 156 of the Laws of 1874 specially conferred upon surrogates the authority to appoint special guardians on the accountings of executors, &c., that he had no power to make such appointment at the time of the first accounting of the executors. But in this position the executors do not appear to be sustained by authority. For before the enactment of this statute, it was practically held that the surrogate possessed the inherent authority arising out of the necessities of the situation, and the object to be attained by means of an accounting, to appoint a guardian *ad litem* to look after and protect the interest of the next of kin not appearing, who should be under the age of twenty-one years (*Kellet agt. Rathbun*, 4 *Paige*, 102). The fact that no statute existed requiring the exercise of this authority did not therefore justify the omission to make such an appoint-

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ment. The hearing, so far as it affected the interests of the petitioner, which resulted in the decree following the first accounting was clearly irregular, and permitted the applicant to disaffirm its authority and apply for its reconsideration after he attained the age of twenty-one years (*Dayton on Surrogates*, [3d ed.,] 506, 507). The first accounting extended over a period of two years and about four months, and it included a general charge amounting to the sum of \$13,880.58, *for one-fourth of the general expenses abroad, &c., and for house expenses, &c., to date*, which was the 1st of October, 1871. This was a large amount for the support, maintenance and education of the petitioner, who was then a boy of about eleven or twelve years of age, and the propriety of its investigation would seem to be suggested by its extent and the statement of it which was given. Other charges of a similar general nature were contained in the account settled on the other accountings, amounting in the aggregate to upwards of \$27,000. Neither of those charges seem to have been challenged or resisted by either one of the guardians appointed to represent the petitioner on the second, third or fourth accountings, but they were wholly accepted and passed as they were contained in the executors' accounts. And by means of these and other charges extending to about the 29th of June, 1881, the sum of \$84,757.15 was in the aggregate charged to have been advanced for the support, education and use of the petitioner. The amounts appropriated to this purpose during the period of his minority was on an average of about \$7,705 each year. It may be that these charges were very properly made and that the executors discreetly and judiciously exercised the authority with which they had been invested by the testator. But inasmuch as they were in no manner made the subject of contest or investigation on behalf of the petitioner in the accountings which took place, a case was presented in which it would seem to be proper, after the attainment by him of the age of twenty-one years, to allow him to contest the propriety of these charges. In the second and third accountings

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the appointment of the guardians seem to have been regarded as so entirely unimportant as to have constituted only a formal compliance with what the law had required in that respect.

The guardians were of no service whatever to the rights and interest of their ward and apparently made no effort to investigate the propriety of any of the charges against him, although the duty to do so was significantly suggested by the large as well as very general charges against him contained in the accounts. For on the 31st of December, 1872, he was charged \$5,441.88 for his share of the household expenses to date. On the 1st of May, 1873, a like charge of \$2,800.99 was made. On the 31st of December of the same year another of \$2,048.40, and on the 31st of December, 1874, a like charge of \$4,803.24, during most of which period it is stated as a matter of fact that the petitioner was absent from home attending boarding school. The last item in the third accounting was equally as suggestive in the same respect, for instead of charging the petitioner with expenses paid out on his behalf, the joint expenses of himself and another was evidently divided, and in the division the sum of \$7,050.60 was charged as his half, and very much the same seems to have been the course of proceeding as to the charges in the fourth accounting. The same propriety, therefore, manifestly exists for favorably considering his application for liberty to contest the items forming the subject of complaint on his part on each of these accountings. As he has applied with reasonable diligence for liberty to make such contest after he attained his full age and received information of the actual state of the accounts, the application was entitled to a liberal degree of consideration. And the same observation is pertinent to the alleged failure of the executors to enforce the guarantees of the second mortgages assigned to them by William T. Blodgett.

As to some of the charges affected by the complaint of the petitioner, it is alleged that the facts indicating them to be correct were within the knowledge of the executors. This complaint more especially relates to expenditures charging

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him with one-fourth of the household expenses after the return of the family from Europe, and to at least one item of \$2,000 stated to have been paid to his mother for his board when he was away at school, and did not board with her for any portion of the time. The executors have asserted the correctness of these charges on the ground that the household was maintained in part by his mother as a home for the petitioner. They have also insisted that they are entitled to the allowance of the charges sustained by these several decrees, for the reason that the petitioner's mother, as testamentary guardian, made and delivered receipts including these charges to the executors. But whether these grounds shall constitute satisfactory answers to the complaints and objections presented in behalf of the petitioner should not now be specially considered, for that cannot be done satisfactorily upon the *ex parte* allegations or affidavits made in support of or to resist such a proceeding. For their adjustment the law has prescribed a different mode of investigation, and that is by allowing the party whose interests are affected by the charges, upon evidence taken in the usual way, to contest their legality and propriety, and as the applicant was supplied with no adequate opportunity for doing so during his minority, that privilege under the authorities should still be accorded to him (*Dayton on Surrogates* [3d ed.], 506, 507, 543).

The application has been further resisted under the latter clause of twelfth paragraph of the will, by which the executors were at liberty to pay over the rents, income and profits of the infant's one-fourth of the estate directly to the widow, to be laid out and expended in her discretion for his support, education and comfort. But this authority was not exercised by the executors. They did not pay these rents, income and profits to her under this clause of the will, but they merely allowed the charges made against the petitioner, taking her receipts practically as their authority for these charges. And if they did that, as it has been alleged they did, with good reason to believe that the charges themselves were to a large

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degree unfounded and improper, the receipts should have no such force or weight as to preclude the petitioner from still contesting the items to which he has specially objected. He may be unable to maintain the propriety of either of the objections urged in his behalf, but it is due to himself and also to the executors, who are men of high character, that an investigation should take place concerning the propriety of these objections. If they are not well founded, then the executors should not be subjected to the imputations which have been made, but they should be vindicated by the action of the proper authorities. While if they are well founded, the rights of the applicant can in no other manner be ascertained than by making a like investigation.

After the petitioner had attained the age of twenty-one years, an agreement was entered into between himself and his three older brothers for the settlement of their rights and interests in the testator's real estate, and its division between them. The two older brothers had received very much larger amounts from the testator's estate than the two brothers who were minors at the death of the testator, and the purpose of this agreement was to secure a division of the real estate upon the basis of the rights of the brothers under the will and codicils, and the proper adjustment of the amounts between themselves, which had been received by the oldest brothers. This agreement was carried into effect; the real estate was divided, and the amounts due from the older brothers to the younger ascertained and adjusted. And because of the making of this agreement and the action of the parties under it, it has been objected that the petitioner was after that disabled from questioning the accuracy of the accountings to which his complaints have now been directed. But the executors were not parties to this agreement. It was made wholly and exclusively by and between the brothers for a determination and settlement of their rights between themselves, and it in no manner relieved the executors from liability in their management and disposition of the personal estate of the testator. If

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the applicant had valid claims against them which had neither been admitted or allowed, neither this agreement nor anything which took place under it released them from that liability, or precluded him from asserting and enforcing their existence against the executors. It was no part of the intention of the agreement entered into to relieve them in any respect from any liability arising out of their management and administration of the personal estate, and all that afterwards took place between the parties to it was simply by way of performing its stipulations and carrying them into effect.

As the case has been presented a reasonable right has been maintained to the success of the application. It may in the end result in no advantage whatever to the applicant, but if it does not the executors are entitled to have that known and ascertained for their own proper vindication. But if the charges made shall be sustained then the applicant is equally and as justly entitled to the benefits which may be secured to him in that manner.

Other points than those which have been considered have been presented in favor of the applicant and also of the executors, but in the view which has been taken of those already considered, these do not require to be discussed or determined. For without them there is sufficient in the case to require the order from which the appeal has been taken to be reversed and an order entered directing the four decrees to be so far set aside and vacated as to allow the charges drawn in controversy by the applicant to be made the subject of future investigation.

The order should be reversed and such an order entered, with the usual costs and disbursements.

BRADY, J., concurred.

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ALBANY OYER AND TERMINER.

THE PEOPLE agt. JOHN H. GRAY.

*Assault and battery — Warrant of commitment — Penal Code, sections 217, 218, 219.*

A warrant of commitment reciting a conviction for the crime of assault and battery and a sentence to imprisonment thereon is valid.

*January, 1884.*

*T. F. Hamilton, for petitioner.*

*D. Cady Herrick, district attorney, for the people.*

WESTBROOK, J. — The relator John H. Gray, who is now detained in the Albany County Penitentiary under a warrant of commitment from JAMES V. SMITH, a justice of the peace of the town of Greenfield, in the county of Saratoga, asks to be relieved from such imprisonment upon the ground that the commitment shows no offense known to the law.

The commitment recites that Gray was, on the 10th day of December, 1883, arraigned before a court of special sessions held by JAMES V. SMITH, a justice of the peace in the town of Greenfield, Saratoga county, to answer for the crime of "assault and battery committed on Norman Potter;" and having been "convicted of said offense" the court adjudged and determined that Gray should be committed to the Albany County Penitentiary, there to be kept at hard labor for the term of four months.

It is insisted on behalf of the relator as the principal ground for the discharge that there is now no such crime known to the law as "assault and battery," as the offense formerly known by that name is now by the Penal Code styled and designated an "assault in the third degree."

A reference to section 219 of the Penal Code shows that the terms "assault" and "assault and battery" have not

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become obsolete, because that section provides that "a person who commits an assault or an assault and battery \* \* \* is guilty of an assault in the third degree." It is true that an assault and battery may be committed under such circumstances as to amount to a graver crime than an assault in the third degree (*Penal Code, secs. 217, 218*). In charging the graver offenses, however, the commission of the acts marking them must be averred. An allegation of a simple assaulting and beating and a conviction thereof is only a statement of a charge and conviction of a simple assault and battery, which by the Penal Code is declared to be "an assault in the third degree." The point then urged in behalf of the defendant is, that although the commitment has described the act of which the defendant has been convicted in the very language which the statute has used to mark and designate the crime of an assault in the third degree, yet as the crime has not also been called by its technical name his detention is illegal.

This position cannot be sound, because the Code itself by using the same language in defining an assault in the third degree makes it clear that the description of the offense in the commitment is one well known to the law. It cannot be at all important that the crime shown by the commitment should be called by its technical name, provided the description therein of the act which constitutes the offense is clear and precise and leaves no doubt as to its exact character. No more accurate statement of the one committed by the defendant can be given than that contained in the warrant of commitment, because it is therein alleged that the defendant was charged with the commission of the very act, or acts, which the section referred to declares to be an assault in the third degree and was duly convicted of the perpetration thereof. It distinctly states that the defendant was duly charged with an "assault and battery committed on Norman Potter," and that he was "convicted of said offense," which is only declaring that he was according to law convicted of

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the crime of assaulting and beating Norman Potter, upon which conviction he was sentenced to imprisonment. As there is no allegation in the warrant of anything more than a simple assault and battery, we know that the crime committed, and on account of which the defendant is enduring punishment, is an assault in the third degree as that offense is defined by the Code.

A reference also to the record of conviction shows that the crime which the defendant committed, and which in both the warrant of commitment and record is called "an assault and battery on Norman Potter," was properly so designated, for in describing the act called an assault and battery it is further stated to have been committed by "striking and punching" the complainant, Norman Potter, several times with a stick, and that after having been duly arraigned upon such charge, and having pleaded not guilty, the "defendant was convicted of the charges above specified." There is no allegation in the record that the beating was charged to have inflicted "grievous bodily harm," nor that he was convicted of any such beating so as to make it an assault in the second degree (*Penal Code, sec. 218*). It therefore shows a conviction for a simple assaulting and beating with a stick, which is included and covered by the definition of what the Code terms and calls an "assault in the third degree."

It was said upon the argument that the very point involved in this proceeding had been decided in the city of New York by judge BARRER, who held that a commitment for an assault and battery could not be sustained. Such decision, if made, is of course entitled to great respect. Of the mode, however, in which the question was there presented, or of the reasons given to sustain it, no information was furnished. If the case in which the decision was made was similar to the present it cannot be adopted as sound. When the warrant of commitment, in stating the offense of which a prisoner has been convicted, uses the very language of the Penal Code in its definition of an assault in the third degree, and when such lan-

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guage apart from the Code defines a crime well known to the law, and when the record of conviction by its more particular recital of the facts of the offense also shows that the crime called in the Code assault in the third degree has been committed, it would be very technical and narrow to adjudge that because the name by which the offense is now known, is not also used, that therefore the conviction and detention cannot be upheld. The right to detain depends upon the proper conviction of the defendant of acts which constitute the crime, and when he has been adjudged guilty of such acts and been condemned to punishment therefor, all of which is fully set out in the commitment, he should not be discharged, because in addition to a complete statement of the act which he had been convicted of perpetrating, the committing magistrate did not further state the legal conclusion from the facts averred that the technical name of the crime which the commission of such acts evinced was an assault in the third degree. In determining whether or not an individual is guilty of a particular offense, we ask, has he committed the act or acts, which in law make and mark the crime? The sufficiency of a commitment should be judged by the same rule; and when such an instrument shows a conviction for doing that which is a criminal offense, to hold it void, merely because it omits to give in addition to the statement showing a due and regular conviction for the perpetration of such acts, the technical name of such offense, is the exaltation of form above substance — the requirement of a name, and the rejection of a description equally exact. A pleading which avers legal conclusions and not facts, is bad. While this rule would not condemn a warrant of commitment, or a record of conviction, as bad, which stated a conviction for a crime by its technical name, without detailing the act or acts constituting it, yet the principle upon which such rule depends is certainly at variance with the hyper-criticism which declares null and incapable of enforcement a judgment of imprisonment rendered upon a conviction for perpetrating certain deeds making a crime, merely

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because such paper does not also declare that such acts mark a specific crime called by a certain name.

In charging an offense in an indictment, it has frequently been held that the exact words of the statute defining the offense need not be used; that it is sufficient if words of a similar import to those used in the statute are employed (*The People* agt. *Enoch*, 13 *Wend.*, 159; *Fitzgerald* agt. *The People*, 37 *N. Y.*, 413).

The reasoning in the cases cited is applicable to the present. Though the crime of which the relator was convicted is not called by its technical name, it is described in language most unmistakable, and in the very words used in the statute to define the offense which the relator has committed. His discharge from imprisonment upon the ground that he has committed no offense known to the law, is clearly untenable, because an offense is plainly and clearly stated both in the commitment and record of conviction. Guilt or innocence of crime, as has previously been stated, depends upon the commission or non-commission by the accused of that which constitutes it. When a commitment shows that a person imprisoned has been according to law duly convicted of doing the thing which constitutes the crime, for the perpetration of which punishment is being inflicted, it is not at all important that such commitment should also designate the offense by its statute name.

For the reasons which have been given, the writ must be discharged, and the relator remanded to the custody of the keeper of the penitentiary.

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Cohn agt. Husson.

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## CITY COURT OF NEW YORK.

COHN agt. HUSSON.

*Supplemental complaint — When will be allowed — Code of Civil Procedure, section 544.*

Where plaintiff's cause of action is upon a promissory note made by defendant to plaintiff's order, and defendant admits the making of the note, but alleges by way of avoidance that since the making and delivery of said note he made and delivered a certain other note as a renewal of the note sued on, and that the latter note was outstanding and not matured, the plaintiff should have leave by supplemental complaint to allege the fact that the note pleaded in defendant's answer as payment of the note in suit was not paid and was in plaintiff's possession, and to pray that he may tender the same on the trial.

*Special Term, March, 1884.**Abraham Kling, for motion.**D. T. McMahon, in opposition.*

BROWNE, J. — Section 544 of the Code of Civil Procedure permits a supplemental pleading, alleging material facts occurring after former pleading, either in addition to or in place of the former pleading.

The plaintiff's cause of action is founded upon a promissory note made by defendant to the plaintiff's order for the sum of \$500. The defendant admits the making of the note, but alleges by way of avoidance that since the making and delivery of said note he made and delivered a certain other note as a renewal of the note sued on; that the latter note was outstanding, and a claim against the defendant at the time of the commencement of this action, and that the same had not matured at the time of the commencement of the action. The plaintiff recovered at trial term, but the judgment was reversed at general term and a new trial ordered, the court holding that the plaintiff should have repossessed himself of

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the renewal note and tendered it back before he could maintain this action on the old note. He now asks leave to serve a supplemental complaint in which he will be permitted to allege "that a note pleaded in defendant's answer as payment to the note in suit was not paid and is in possession of the plaintiff, and that he may tender the same on the trial."

Whether the permission, if accorded, to allege these facts in a supplemental complaint will enable the plaintiff to recover or not, I do not seek to determine. That they are facts which have arisen since he served his complaint, will not be disputed, and as the general term did not question the plaintiff's right to maintain his action upon the original note, but held that the right was suspended until the renewal note was dishonored, it appears to me the facts he now desires to allege by supplemental complaint as to its dishonor, and his possession of it, are "material facts."

As the averment of such facts is sought to aid a recovery upon the original cause of action founded upon the old note, and neither to add nor substitute a new controversy arising out of any transaction occurring since suit brought, I think the relief ought to be granted.

That a supplemental complaint will not be allowed, where it attempts to introduce an independent, substantive cause of action growing out of later facts, upon which a judgment could be rendered without reference to the original complaint, is well settled, and the cases cited by the learned counsel for the defendant amply support that view; but, on the other hand, they are not in conflict with the proposition that new matter may be alleged in aid of the original cause of action, which occurred subsequently to the commencement of the suit.

The case of *Muller agt. Earle* (reported in 5 N. Y. Supr. Ct. R., 388), was an action originally commenced as one for equitable relief, to ascertain and determine the amount due to the plaintiff for erecting certain buildings, in which he demanded an injunction as a part of the relief sought, restrain-

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ing the comptroller (who was also made a party) from paying and the defendant Earle from receiving a sum of money named. At the trial his complaint was dismissed, but after a new trial had been granted he moved for leave to change his action, either by amendment or supplemental complaint, to a mere money demand on contract, for the reason that the whole amount of the award which was in the comptroller's hands when he brought his suit had been actually paid over to the defendant. Justice FREEDMAN (at p. 391) justly decided the application to be an attempt on the part of the plaintiff to withdraw the action pending and substitute another and an entirely different cause of action, which occurred after the institution of the first suit.

The case of *Bostwick* agt. *Menck et al.* (4 *Daly R.*, 68) was an action brought by plaintiff as receiver in proceedings supplementary to an execution issued against the defendant Beiser, upon a judgment recovered against him by one Dolan, to set aside a general assignment made by Beiser to the defendant Menck for the benefit of his creditors. After trial, resulting in a judgment in plaintiff's favor, and a reversal by the court of appeals which ordered a new trial, plaintiff asked leave to file a supplemental complaint alleging the recovery of six other judgments against Beiser since he brought his action, and his appointment as receiver in each of them. The court at general term decided that as the supplemental complaint sought to be filed stated no matter which aided or varied the case presented by the original complaint, nor in any way supported the rights of the judgment creditors mentioned therein, but alleged and presented claims on behalf of other creditors which was entirely independent, and wholly unaffected by the pleadings interposed, the issue of a supplemental complaint should not be allowed, for they were really six new causes of action by other claimants having distinct interests from those represented by the original complaint.

But this case presents a widely different aspect. Here the same consideration upon which the recovery is sought under

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Callanan agt. Gilman.

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the old note was continued in the new. The one was a mere renewal or extension of the other. No different or additional cause of action is attempted to be set out, the recovery will still be sought upon the original cause of action. The averment of the subsequently occurring fact as to the renewal note maturing after the commencement of the action, and its being dishonored, is not intended to enlarge or change the prayer for relief, nor to alter the character of the issue, but is rather intended to support a recovery upon the original cause of action, which is still to be based upon the right to relief on the note in suit.

The case of *Fincke* agt. *Rourke* (20 *Hun*, 264) is somewhat analogous in principle to this action as regards the relief sought by plaintiff.

An order will be granted that plaintiff have leave by supplemental complaint to allege the fact that a note pleaded in defendant's answer as payment to the note in suit was not paid and is in possession of the plaintiff, and to pray that he may tender the same on the trial.

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## N. Y. SUPERIOR COURT.

LAWRENCE J. CALLANAN and JAMES KEMP agt. GEORGE F. GILMAN.

*Street obstructions — What are, and when a public nuisance — When may be restrained at the suit of an individual — Answer — Form of denial bad.*

Where defendant in his answer denies "specifically each and every allegation of the complaint, except those hereinafter admitted, qualified or explained:"

*Held*, that this form of denial is bad and the allegations of the complaint must be held to be admitted by the defendant.

Any unauthorized continuous obstruction of a public street is a public nuisance for the reason that the public are entitled to an unobstructed passage upon the streets and sidewalks of the city.

The placing of skids across the sidewalk in front of a party's premises is

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a great inconvenience to the public and may be restrained at the suit of an individual who has sustained a private injury thereby.

*Special Term, September, 1884.*

TRUAX, J.—The plaintiffs allege in their complaint among other things, that the defendant obstructed the sidewalk with intent to injure the plaintiffs; that such obstruction prevents the plaintiffs and their employes and patrons from passing and repassing along the sidewalk, to the detriment and great injury of plaintiffs and their business; that such obstruction is maintained every day from three to five hours, and averages fully four hours each day during the business hours of the day; that the defendant has been requested to remove such obstruction but he refuses to do so to the great and irreparable injury of the plaintiffs; that such obstruction is a public nuisance of special injury to the plaintiffs for which they have no adequate remedy at law and cannot be adequately compensated in damages. The defendant denies “specifically each and every allegation of the complaint except those hereinafter admitted, qualified or explained.” This form of denial is bad, and it must be held that the above allegations of the complaint are admitted by the defendant (*Yuce agt. Alexander*, 49 *Sup. Ct. R.*, 205, and cases there cited; *Clark agt. Dillon*, 4 *N. Y. Civ. Pro.* [*Browne*], 245). It has long been held by the courts of this state that any unauthorized continuous obstruction of a public highway or street is a public nuisance (*Davis agt. The Mayor, &c.*, 14 *N. Y.*, 506; *Trenor agt. Jackson*, 15 *Abb. [N. S.]*, 115). The reason is that the public are entitled to an unobstructed passage upon the streets and sidewalks of the city (*Clifford agt. Dam*, 81 *N. Y.*, 52). The obstruction caused by the defendant is unauthorized. The board of aldermen cannot authorize a public nuisance (*Trenor agt. Jackson, supra*; *Ely agt. Campbell*, 59 *How.*, 333; *People agt. Mayor*, 59 *id.*, 277; *People agt. Mayor, Daily Register*, April 23, 1884, *BARRETT, J.*; see, also, *Metropolitan Tel. Co. agt. Colwell Lead Co., Daily Register*, Aug. 13, 1884, *INGRAHAM, J.*).

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The defendant has admitted in his answer that the obstruction is a public nuisance, and the facts proved on the trial show that the obstruction was continuous.

This case is similar to the case of *Rex agt. Russell* (6 East, 427), in which it was held that a wagoner who occupies one side of a public street in a city, before his warehouse, in loading and unloading his wagons, for several hours a day, and who has at least one wagon usually standing before his warehouse, so that no carriage can pass on that side of the street, and sometimes foot passengers were inconvenienced by cumbrous goods lying on the ground on the same side ready for loading, is indictable for a public nuisance, although there were room for two carriages to pass on the opposite side of the street. The court said that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot (*See Trenor agt. Jackson*, 15 Abb. [N. S.], 126; *Taylor's Landlord and Tenant*, 193, and cases there cited).

No doubt the skids used by the defendant are a convenience to him, but extending from a wagon at the curb across the sidewalk they are a great inconvenience to the public and the plaintiffs. The defendants admit (and I have so found) that the plaintiffs have sustained private injury, and for this reason, if for no other, they are entitled to an injunction restraining the defendant from using the skids (*Trenor agt. Jackson*, 15 Abb. [N. S.], 126, and cases there cited).

Judgment is ordered for the plaintiffs, with costs.

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## CITY COURT OF NEW YORK.

HENRY P. LONDHEIM *et al.* agt. CUMBERLAND G. WHITE *et al.*

*Supplementary proceedings — Receiver — Stock Exchange membership — Seats in Stock Exchange property and subject to payment of debts.*

A seat or membership in the New York Stock Exchange is valuable property and subject to the payment of debts.

Although a receiver cannot, under the rules of the Stock Exchange, take an assignment of such seat or membership, the court has power to direct an assignment to a person other than the receiver, qualified under such rules to hold it. All the rights and interests of the Stock Exchange in such seat or membership are fixed and determined and cannot be divested or infringed by any order of the court, therefore the Stock Exchange is not a necessary party to a proceeding to compel a transfer.

*Special Term, February, 1884.*

MOTION on behalf of Samuel B. Hamburger, receiver in supplementary proceedings, to compel Cumberland G. White, one of the defendants and judgment debtors, to transfer to said receiver his seat or membership in the New York Stock Exchange, and for such other relief as may be just.

*Jonas H. Goodman*, for receiver.

*Joseph Ullman*, for plaintiff.

*Charles H. Reed*, for judgment debtor.

HALL, J. — Upon this motion there is no question raised as to the regularity of the proceedings or the appointment and qualification of the receiver. And it appears from the examination and is admitted that Cumberland G. White is the owner of a seat, or membership, in the New York Stock Exchange. The objections urged to the motion are:

*First.* That a judge has no power to order a judgment debtor by an *ex parte* order to execute such assignment.

*Second.* That a receiver cannot take an assignment of a seat

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or membership in the New York Stock Exchange, as he is not a member, or member elect, of such exchange.

*Third.* That the New York Stock Exchange has an interest in all seats or memberships, and hence is a necessary party to any proceeding to transfer the same.

And it is also claimed, incidentally that the seat or membership in said exchange is incorporeal and not capable of transfer by assignment and is merely a personal privilege.

It is sufficient to say in regard to the first point that the *ex parte* order directing the transfer is only in the alternative, requiring the judgment debtor to execute an assignment or to show cause why he should not be required to do so; he has not executed the assignment and now appears to show cause. In fact, the order to show cause is equivalent only to a notice of motion to compel the transfer, and, if necessary, the direction contained in it may be treated as mere surplusage, which has not in any manner injured or prejudiced the judgment debtor.

It must be conceded, I think, in the light of all the decisions, that a seat or membership in the Stock Exchange is property, and should be applied in the same manner as other property of a debtor to the payment of his debts. It may be surrounded and clogged with conditions and restrictions, but still it is property available for the payment of debts, and can be made available for that purpose subject to and by an observance of those restrictions and conditions.

That the membership is valuable is shown by the fact that the initiation fee is \$10,000, and among all business men it has an established and tangible value. It is an asset upon which creditors have a right to rely for payment of debts. This question has been passed upon so frequently by the courts as to make it no longer doubtful or debatable (*Grocers' Bank* agt. *Murphy*, 60 *How. Pr.*, 426; *Ritterband* agt. *Baggett*, 4 *Abb. N. C.*, 67; *U. S. Dist. Court, Re Ketcham*, *Daily Reg.*, February 9, 1880; *Powel*, *rec'r*, agt. *Waldron*, 89 *N. Y.*, 328; *Platt* agt. *Jones*, *Supr. Ct., Gen. Term*, *MS.*

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*opin.*). I quote a single sentence from the opinion of BEACH, J., in *Grocers' Bank agt. Murphy (supra)*. He says, in reference to the contention of counsel that a seat in an exchange is not tangible property and cannot be reached by creditors: "If such a result may be attained, the efforts of an active imagination cannot circumscribe the associations human ingenuity will produce to thus transmute veritable assets into intangible and yet most substantial and valuable shadows.

The second point raised on behalf of the judgment debtor is that the receiver not being a member or member elect of the Stock Exchange cannot under the rules of the exchange take an assignment of the seat or privilege.

It is true, as claimed by counsel, that the New York Stock Exchange is a voluntary association, and that its seats or memberships are governed and restricted by certain rules and by-laws adopted by the exchange, and only in accordance with those rules and restrictions can a transfer of such membership be made so as to be available to the transferee. I have examined the constitution and by-laws of the New York Stock Exchange, and I find the following in regard to transfers of memberships:

"Any member shall have the right to transfer his membership under the provisions of the following sections:

"SECTION 1. When any member wishes to transfer his membership, the name of the proposed transferee shall be submitted to the committee on admissions, and on approval of two-thirds of said committee the transfer may be made, provided the member transferred has no unsettled contracts."

"SEC. 3. In no case shall any transfer of membership be permitted until all dues to the Stock Exchange shall have been paid in full, said dues being hereby declared a prior lien upon the proceeds, to be satisfied in full before any distribution thereof shall be made."

It may be said, in general terms, that all property of the judgment debtor not exempt by law passes to the receiver, upon his appointment and qualification and upon demand, and

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upon a refusal to deliver such property to the receiver he may compel such delivery by motion or action. The property which the judgment debtor had in the membership in the Stock Exchange passed to the receiver, and he now seeks the aid of the court in order to render such property available for the payment of debts. The objection that the transfer cannot be made direct to the receiver is, it seems to me, one of form rather than substance, but if it were necessary I have no doubt of the power of the court to direct a transfer to the receiver, and that he might hold it as trustee for creditors and give a valid assignment of it to any one qualified to exercise its privileges. Such a course might, however, raise doubts and compel litigation to settle the questions, and I am of opinion that there is no need of any such circumlocution. The motion is for a transfer to the receiver, "or such other or further relief as may be just and equitable." I think this prayer for relief is broad enough to comprehend and include the transfer to a person other than the receiver, who may be qualified under the rules of the exchange. This view is sustained and borne out by all the authorities which I have been able to discover.

*Powel, receiver, agt. Waldron (supra)* was an action by a receiver in supplementary proceedings to compel the transfer to him of a membership in the Cotton Exchange which had been hypothecated by the judgment debtor to defendant. FINCH, J., delivering the opinion of the court, says: "Being property, it passed to the receiver in supplementary proceedings, subject to the lien or right of defendants." "Whether he could make it available, or in what manner convert it into money, or how it might prove to be incumbered under the rules of the exchange, are after questions, in which defendants have no present interest."

*Grocers' Bank agt. Murphy (supra)*, BEACH, J., delivering the opinion of the court, says, in regard to the manner in which the membership may be transferred and made available: "Probably an order appointing a receiver, containing directions for the judgment debtor to do whatever may be

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deemed needful to transfer the seat under the rules of the exchange, would accomplish the result sought. The right existing, the law is sufficiently comprehensive to its enforcement."

In *Ritterband* agt. *Baggett* (*supra*), SPIER, J., delivering the opinion, at special term, says: "The question being settled that the seat is property of value, I think it is the duty of the court to enforce its transfer for plaintiff's benefit in this action, either to a receiver or to a third person qualified to work out the designs of the law. By a by-law of the exchange this property cannot be assigned to any one but members; it cannot, therefore, be assigned to the receiver, as he is neither a member or a member elect. If this property cannot be reached by a receiver, by reason of the restrictions placed upon its transfer by a by-law of the Cotton Exchange, then to this extent the object and intent of the Code becomes not only a dead letter, but lifeless in spirit. These restrictions do not, however, form an insurmountable obstacle. But if an assignment is necessary, I do not question the power of the court to direct it to be done. It is not an indispensable requisite that such assignment be made direct to the receiver; it may be made to a purchaser from him who is a member or member elect."

In *re Ketcham*, a bankrupt (*supra*), which came before judge CHOATE upon a motion to compel a bankrupt to assign to his assignee, or to such person as the assignee might procure as purchaser, a seat in the New York Stock Exchange, and after a review of the authorities holding that such a seat was property, and subject to the payment of the debts of the bankrupt, judge CHOATE says, in regard to the manner of transferring it, and making it available for the payment of debts, &c.: "Whatever it may be necessary for the bankrupt to do to make the right available to the assignee, he will be required to do. There is no difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid. I see nothing in the rules of the

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exchange which renders it impossible for the seat to be disposed of by the assignee, with the co-operation of the bankrupt, subject to the condition above named. The peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, unessential, mere technical cobwebs which the law is strong enough to break through."

The last three cases are cited and approved in *Powel* agt. *Waldron* (89 N. Y., *supra*). The case of *Platt* agt. *Jones* is not in point upon this branch of the case, but will be referred to hereafter. The only remaining question then is, can the order be made in this proceeding in which the Stock Exchange is not a party?

In order to reach an intelligent determination of this question, it is necessary to inquire what rights, if any, the Stock Exchange has in the seat or membership which can in any manner be injured or infringed by such transfer. It has a right to refuse a transfer of the membership until all contracts of the present holder with members of the exchange are settled, and until all dues of the present holder are paid. And the person to whom the transfer is made in order to avail himself of the privileges of membership must be approved by two-thirds of the committee on admissions.

The Stock Exchange has been served with a copy of the notice of motion herein, and has notice of this proceeding, but it does not seek to intervene or assert any rights in the matter, but the judgment debtor, more tender of its rights than it is, raises the objection and seeks to obtain the benefit of it, but the exchange stands supinely and silently by without seeking to interfere, and probably for the reason that its rights in the membership are fixed and cannot be questioned or disturbed.

Although the exchange is not a party to this proceeding, yet, if any order necessary or proper to be made herein, would or could infringe or interfere with any of its rights, it certainly ought to be made a party in some manner more formal than

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by a mere notice of a motion against one of its members. But no order which this court can make can in any manner impair or interfere with the rights of the exchange. The membership is now held under certain rules and restrictions which are reasonable, and the membership carries with it certain burdens, and any transferee of the same must take it *cum onere* and subject to all the rules which govern it in the hands of the present owner. Unless such transferee be a member elect of the exchange he cannot exercise or have any privilege under it, nor can a transfer release the membership from the burden of settling all outstanding contracts and the payment of all dues of the present owner. It was not even suggested in any of the cases cited, except *Platt* agt. *Jones*, that the exchange was a necessary party to a proceeding to procure a transfer of such a seat or membership, or that it could lose any rights by not being made a party.

The case of *Platt v. Jones (supra)*, in which a manuscript opinion of SEDWICK, C. J., was handed up by counsel for the judgment debtor, I have examined very carefully, but do not regard it as containing any views contrary to those herein expressed. It was an action in equity, and the decision is that the equitable rights which plaintiff claimed were future and contingent, and that the contingencies feared had not arisen. And I find no reason given, either in this opinion or the brief of defendant's counsel, to show why the Stock Exchange should have been made a party to this proceeding. I am therefore of the opinion :

1. That the motion is regularly made, and the relief sought is sufficiently comprehensive to include a transfer of the membership to a person other than the receiver.

2. That although the receiver cannot take an assignment of the membership which would entitle him to exercise its privileges, the judgment debtor can be compelled to assign it to a person qualified to hold it under the rules of the exchange.

3. That the New York Stock Exchange has no interest in such membership which can be affected by any

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order to be made hereon, and is not a necessary party to this proceeding.

Let an order be entered requiring and directing the judgment debtor, Cumberland G. White, within five days after service of a copy of such order, to execute any transfer, assignment or other instrument necessary for the purpose of vesting the title of his seat or membership in the New York Stock Exchange in such person as the receiver may procure to purchase the same for a suitable price, and who may be qualified to hold the same under the rules of such exchange, and subject to all claims against the same or the proceeds thereof existing at the time of service of the order to show cause under the rules of such exchange.

An order may be presented for settlement on one day's notice.

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## SUPREME COURT

HENRY H. WILKINSON agt. EDWARD LITTLEWOOD and others,  
as executors of the last will and testament of JOHN LITTLEWOOD, deceased.

*Costs — When to be allowed against an executor in his representative capacity —  
Code of Civil Procedure, sections 1835, 1836.*

Where a claim was presented to J., an attorney of an executor, and was disputed and an offer was made to refer the same under the statute, and afterwards plaintiff's attorneys served upon J. a written notice directed to him as attorney for the executor renewing plaintiff's offer to refer and to appear before the surrogate at such reasonable time as he, J., should name to have the reference agreed upon and perfected, concluding as follows: "And you will also take notice that your omission to appoint a time for a meeting before the surrogate will be regarded as a refusal to refer." And in response to such notice the plaintiff's attorneys were served with a written notice from J. stating, in substance, that the alleged claim had been withdrawn by the person who presented it and that there was "no subject matter for a reference and no occasion for the choice of a referee:"

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*Held*, that this amounted to a refusal to refer and is sufficient to entitle plaintiff to costs, &c., unless the withdrawal of the claim as alleged would prevent. But the defendants having alleged such withdrawal should establish it affirmatively.

The plaintiff's attorneys having pressed their claim continually, and defendants having had every opportunity to refer before the commencement of the action, they not having taken steps to secure a proposed reference, the plaintiff having succeeded is entitled to recover his taxable costs and disbursements.

*Greene County Special Term, 1884.*

MOTION by plaintiff for allowance of costs after recovery against the defendants.

*Hawver & Cochrane*, for plaintiff and motion.

*John Cadman* and *P. M. Jordan*, for defendants, opposed.

OSBORN, J. — In October, 1882, the plaintiff caused to be presented to P. M. Jordan, Esq., counselor, &c., a claim against defendants for services alleged to have been rendered by plaintiff for their testator. Subsequently by a writing bearing date October 12, 1882, executed by one of the defendants, addressed and delivered to plaintiff, the said claim was disputed and an offer made to refer the same under the statute, &c. Plaintiff then placed his claim in the hands of his present attorneys, and several interviews between them and Mr. Jordan followed. Thus far the parties substantially agree. It is claimed by defendants that in *all* of his communications with plaintiff's attorneys Mr. Jordan insisted that the claim in suit had been withdrawn from the executors, while the plaintiff contends that no such position was taken by Mr. Jordan at the first and second interviews between him and plaintiff's attorneys, but on both occasions they differed only as to selection of a satisfactory referee, and the withdrawal of the claim was not advanced by Mr. Jordan until some time afterwards. But the view I have taken of the matter renders it unnecessary to examine critically the unfortunate misunderstanding between counsel.

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On March 27, 1883, the plaintiff by his attorneys served upon Mr. Jordan a written notice, directed to him as attorney for defendants, renewing plaintiff's offer to refer, &c., and to appear before the surrogate at such reasonable time as he, Jordan, should name, to have the reference agreed upon and perfected, concluding as follows: "And you will also take notice that your omission to appoint a time for meeting before the surrogate will be regarded as a refusal to refer."

On the following day, in response to such notice, the plaintiff's attorneys were served with a written notice from Mr. Jordan, stating in substance that the alleged claim had been withdrawn by the person who presented it, and that there was "no subject matter for a reference and no occasion for the choice of a referee." This, in my judgment, amounted to a refusal to refer, and is sufficient to entitle plaintiff to costs, &c., unless possibly the withdrawal of the claim as alleged would prevent. But the defendants having alleged such withdrawal should establish it affirmatively. It is insisted by defendants that Mr. Stupplebeen who presented the claim withdrew it a few days afterwards, but Mr. Stupplebeen swears positively that he never withdrew it. The plaintiff himself swears that *he* never withdrew it nor authorized *any* person to do so for him. Such denials meet defendants' allegations of a withdrawal sufficiently upon the papers submitted, and hence I am unable to find that defendants have established that fact affirmatively.

It is urged that there is no proof that Mr. Jordan was authorized to act for the executors in referring this claim. It was presented to him, and such presentation ratified by the executors in their subsequent rejection and offer to refer. I think that such ratification, together with other evidence in the case of Mr. Jordan's authority as attorney and counsel for defendants, was sufficient to lead plaintiff and his attorneys to deal with Mr. Jordan in the matter, and thereby bind the defendants for the purpose of this motion at least (*See Russell agt. Lane*, 1 Barb., 525, 526).

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Plaintiff's attorneys seem to have pressed this claim continually, and defendants had every opportunity to refer before the commencement of this action. They did not take steps to secure a proposed reference, and it seems to me that the plaintiff having succeeded herein ought to recover his taxable costs and disbursements.

An order accordingly may be entered, with ten dollars costs of motion.

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### SUPREME COURT.

THE PEOPLE *ex rel.* THE ALBANY AND GREENBUSH BRIDGE COMPANY agt. WILLIAM J. WEAVER and others, THE BOARD OF ASSESSORS OF THE CITY OF ALBANY and others.

*Taxes and assessments — rule which assessors must observe in valuing property — Oath to an assessment-roll which will render an assessment void.*

Where the statutes provided that assessors in valuing property must assess it "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor," and upon the completion of their roll they are required to swear that they have observed that rule in the valuation of all real estate.

Where a party seeks by *certiorari* to reduce an assessment upon his property, and in return to the writ the assessors do not pretend that they have obeyed and followed these provisions of the statutes, but they declare that "the valuation made by them of the property is just and fair, and at as fair a rate and just proportion as that of other property assessed by them, according to the best of their knowledge and belief:" *Held*, that, as they have not certified to the court that they have followed the statute, their judgment should have no influence upon the decision. In determining the value of bridge property in the mode which the statute directs, the true criterion of such value must be its earning capacity, not its original cost.

*Albany Special Term, September, 1884.*

*Parker & Countryman*, for the relator.

*Henry Smith*, for the respondent.

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The People *ex rel.* The Albany and Greenbush Bridge Co. agt. Weaver.

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WESTBROOK, *J.*—The relator seeks by *certiorari* to reduce the assessment upon its property located within the city of Albany, consisting of the westerly end of the iron highway and foot bridge across the Hudson river, and the westerly approach to the bridge, including the gate-house, ferry slip, &c. The original assessment fixed the valuation of the property at the sum of \$280,000. Upon the application of the relator, the assessors, after a hearing, reduced such valuation to the sum of \$225,000. The relator claims that the valuation is still excessive, and the case is submitted upon the petition, the return, and the evidence taken before the assessors.

The statutes of this state are explicit and clear as to the rule which the assessors in valuing property must observe. They must assess it "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor" (2 *R. S.* [7th ed.], 992, sec. 17); and upon the completion of their roll they are required to swear that they have observed that rule in the valuation of all real estate (*Same vol.*, page 994, sec. 7). In their return to the writ, the assessors do not pretend that they have obeyed and followed these provisions of the statutes, but they declare that "the valuation made by them of the property of said bridge company is just and fair, and at as fair a rate and just proportion as that of other property assessed by them, according to the best of their knowledge and belief."

In *Beach* agt. *Hayes* (58 *How.*, 17), the judge writing this opinion held that an oath to an assessment-roll which did not follow the statute, and which in substance stated a valuation upon a principle similar to that adopted by the assessors, according to their return in this case, renders the assessment void. It is not at all important that the assessors regard their assessment as "just and fair," and that it is "at as fair a rate and just proportion as that of other property," the question is: has it been assessed at its full and true value, as they would appraise the same in payment of a just debt due from

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a solvent debtor? It does not appear but that the assessors regarded some other rule as "just and fair," and it is impossible without information to know what is meant by the expression "at as fair a rate and just proportion as that of other property."

There is no need, however, of speculation as to their meaning. They have not certified to the court that they have followed the statute, and their judgment can therefore have no influence upon the decision. In determining the value of the property of the relator in the mode which the statute directs, it is an evidently sound proposition that the true criterion of such value must be its earning capacity. A dwelling-house or a farm may have, by reason of advantages of location for beauty or for health, or the expenditure thereon of large sums of money to gratify the taste or to conduce to the comfort of the owner, a greater value than its earning capacity, but property of the description of that owned by the relator, built exclusively to earn money for its owners, must be judged by its ability to accomplish the purpose for which it was constructed. A creditor to whom a solvent debtor applies to pay a debt by turning over property of this character would naturally inquire, "what will it produce to me?" A rosy description of its future, based upon the completion of other enterprises not yet begun, would not be apt to lead him from the examination of what it was producing to its owner at the time of the proposed sale. To all arguments founded upon future prospects he would be apt to reply, "all this is conjecture; if other improvements are in process of erection, that fact might have some weight, but so long as they are unbegun and not even contemplated, they can have no influence."

Precisely this argument applies to the present case. The bridge of the relator was constructed for the purpose of a railroad bridge as well as for the purpose of accommodating foot passengers and carriages. To accomplish the object of its construction, to wit, the accommodation of railway companies, the structure was made very much heavier and

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stronger than it would have been made if intended only for use by foot passengers and by carriages and wagons. The strength of the structure added very largely to its cost, but unfortunately for its projectors the line of railroad which it was to accommodate has been abandoned, and its only use up to the present time has been for purposes which were secondary to its main object. So far as the testimony shows there is now in existence no line of railroad which the bridge would accommodate, and the construction of none has as yet been proposed. Under such circumstances it would be unjust to base the valuation of the property of the relator upon its actual cost, for such cost has as yet added nothing to its earning capacity, and whether or not it will do so in the future is as yet entirely problematical.

If the advantage to be attained in the construction of the bridge, to wit, its use by railroad corporations, shall ever be attained, it will then be proper in judging of the value of the structure, to take that fact into consideration, but until such event occurs a valuation based thereon is entirely speculative, and should not and ought not to control at the present time. That in valuing the property of the relator the assessors should have been largely controlled by the earning capacity of the property assessed, is sound, is apparent, not only on reason, but from an express adjudication of this court at the general term of this department in *People agt. Pond* (13 *Abb. N. C.*, 6), which decision was followed and adopted by myself in the recent case of *The People on the Relation of the Wallkill Valley Railroad Company agt. Nathan Keator and others, Assessors of the Town of Rosendale*, and such rule will therefore be adopted in the present case without any further discussion.

A reference to the testimony given upon the hearing before the assessors relating to the cost of the bridge and its approaches, and that which shows the cost at which the property could be reproduced at the present time, shows that the assessors in valuing such property were governed by the cost

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of the structure rather than by its earning capacity. In so doing they disregarded the adjudication of this court at general term, and for that reason their judgment of value cannot be upheld.

The evidence given by A. Bleecker Banks, the president of the relator, is entirely uncontradicted. In his testimony he gave the total cost of the structure with its approaches, and also its gross and net receipts from the opening on January 26, 1882, up to and including September 30, 1883. After detailing the cost of the structure, with its approaches and its income, he says: "That the present true and full value of said bridge, including the approaches, as the same would be applied in the payment of a just debt from a solvent debtor, does not exceed, in deponent's judgment, the sum of \$255,000.

"That the center of the channel of said Hudson river at said bridge is at the center of the bridge proper, and where the pivot pier is located, leaving only about four-tenths of the entire structure, including approaches, within the limits of the city of Albany and assessable in said Fourth ward.

"That the other six-tenths of said bridge property is assessed on the opposite side of the river, in the town of Greenbush. That the present value of said bridge and landed property lying within the city of Albany does not exceed \$110,000, and the amount of the assessment for said bridge and landed property in the Fourth ward of said city should, therefore, not exceed the sum of \$110,000.

There was no evidence given to the assessors which in any way was in conflict with it. On the contrary, the evidence of Alfred P. Boller, the engineer under whose superintendence and plans the structure was erected, is corroborative thereof, and the testimony as to its actual value within the city of Albany being only \$110,000, is fully corroborated by the evidence of the receipts from its use.

It is true that the evidence given by Mr. Banks was not necessarily controlling upon the assessors. They could still exercise their own judgment, founded upon observation of

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the property and any reliable information as to its earning capacity. There is, however, absolutely nothing in the return from which it can be seen that they disregarded the evidence of Mr. Banks because he untruly stated either the cost or the earnings of the property. If they had unequivocally stated to the court that they had valued the property as the statutes directed them to value it, their judgment would have had great, and perhaps controlling weight; but when they do not so state to the court, but, on the contrary, declare "that the valuation made by them of the property of said bridge company is just and fair," without any statement by them as to the rule adopted in arriving at a just and fair valuation, and when the court can see from the sum at which the property has been valued and the cost of the structure (as the court can see in this case) that such valuation has been largely controlled by the cost, the valuation made by them cannot be upheld, and must be reduced to the sum fixed by such uncontradicted evidence, to wit, \$110,000.

As there is nothing shown to impeach the good faith of the assessors, no order charging them with the costs of this proceeding will be made.

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## SUPREME COURT.

THE PEOPLE *ex rel.* CLARA SHERREER agt. ANDREW WALSH,  
police justice.

*Abandonment — Certiorari the proper mode of review of decisions of magistrates in proceedings for abandonment — No appeal is given in such proceedings — Code of Criminal Procedure, section 899 — Facts which are not decisive of questions of abandonment.*

*Certiorari* is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under section 899 of the Code of Criminal Procedure.

Such a proceeding is not a criminal action as defined in that Code, and the justice before whom it is brought sits as a magistrate and not as a court of special sessions. No appeal is given in such proceedings.

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On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him because she was in imminent danger of suffering personal violence at his hands, her case is made out and it is therefore error on the part of the magistrate to exclude such testimony.

*Second Department, General Term, July, 1884.*

*Before BARNARD, P. J., DYKMAN and PRATT, JJ.*

THE relator made complaint against her husband, Conrad Sherrer, before Andrew Walsh, a police justice of Brooklyn, under section 899, subdivision 1, of the Code of Criminal Procedure, charging him with being a disorderly person in having abandoned his wife. On the hearing it appeared in evidence that the relator had left her husband's house. She offered evidence to show that her husband had beaten her and threatened her life, and that she left him because of his abuse and threats and because she was in danger of personal violence. This evidence was objected to by the husband's counsel, on the ground that if a woman leaves her husband's house abandonment is at an end, and her reasons for leaving are irrelevant. The justice sustained the objection and dismissed the complaint.

The relator obtained a writ or *certiorari* to review this decision. At general term it was strenuously contended by counsel for defendant that the decision could only be reviewed by appeal. The opinion is as follows :

*A. H. Dailey (J. D. Bell, of counsel), for relator.*

*Fisher & Voltz (Jesse Johnson, of counsel), for justice WALSH.*

PRATT, J. — This is a proceeding by *certiorari* to review in this court the decision and rulings of a police justice. The decision and rulings brought to be reviewed were given upon

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a trial before the justice upon a complaint made against Conrad Scherer by his wife, the relator herein, for abandonment. The justice refused to admit certain testimony offered on behalf of this relator and dismissed the complaint. The charge was made under section 899 of Code of Criminal Procedure (*subd.* 1) and the first question to be disposed of is whether the action of the magistrate can be reviewed by *certiorari*.

By section 515 of Code of Criminal Procedure writs of *certiorari* in criminal actions as they have heretofore existed are abolished and a review had by an appeal, but this action refers only to criminal actions as defined in that Code. The proceeding before the magistrate was not strictly a criminal action, but was a special proceeding of a criminal nature under part 6 of the Criminal Code, title 7. No right of appeal seems to be provided for under this part of the Criminal Code, except under title 5: "Of proceedings respecting bastards." And hence section 515 abolishing writs of *certiorari* does not apply to part 6, but the law remains as it existed before the Criminal Code.

Section 515 in plain terms refers only to a judgment or order in a criminal action and not to a special proceeding of a criminal nature. This distinction is rendered more apparent by referring to title 2, part 6 of the Criminal Code, sections 950, 951 and 952. It is clear, therefore, that no right of appeal was given by the Code to either party in this proceeding. It cannot be claimed that an appeal was authorized by section 749, which provides for appeals from judgments rendered by a court of special sessions.

It is true the defendant entitled the proceedings as in special sessions, but that did not affect the rights of the parties. The proceedings were not in a court of special sessions, but were before the defendant as police justice. There is a marked distinction between courts of special sessions and courts held by police justices under special provisions of law both in the constitution and the Code of Criminal Procedure (*People agt. Trumble*, 1 *Crim. Rep.*, 443). It was also held in *People agt.*

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*Burleigh* (same vol., 522, 523), that where authority is conferred upon a particular officer or magistrate giving to him special jurisdiction in a criminal matter with special directions as to the mode of procedure, he must be deemed to act as an officer and not as a court of special sessions. This principle is decisive in this case.

Section 399 gave special jurisdiction to a police justice with special directions as to the mode of procedure, and the justice must be deemed to have acted as an officer and not as a court of special sessions. The writ of *certiorari* is therefore a proper remedy under which to review the proceedings.

We also think the defendant erred in excluding testimony showing it was unsafe for the wife to remain in the house with the accused. There is no rule of law requiring a wife to remain under the roof of a brute, in constant danger of life and limb, under pain of starvation. It was, therefore, competent for the relator to show that she had reasonable cause to leave the house where she was in imminent danger of suffering personal violence at the hands of her husband. If this testimony had been received, the offense of which the accused was charged would have been clearly made out under the statute. This statute has been under the consideration of this court since its amendment and its provisions fully discussed (*People agt. Naehner*, 1 *Crim. Rep.*, 513).

The decision of the police justice must be vacated and set aside, without costs.

BARNARD, P. J., and DYKMAN, J., concur.

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Viotor *et al.* agt. Henlein *et al.*

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SUPREME COURT.

GEORGE F. VIOTOR *et al.*, respondents, agt. MOSES HENLEIN  
*et al.*, appellants.

WILLIAM E. ISELIN *et al.*, respondents, agt. MOSES HENLEIN  
*et al.*, appellants.

EMIL OELBERMAN *et al.*, respondents, agt. MOSES HENLEIN  
*et al.*, appellants.

*Attachments — Affidavits of fraud which are insufficient to sustain an attachment — Acts which would not amount to fraud.*

Where the affidavits upon which attachments were granted failed to show affirmatively that the debts upon which the suits were brought, and for which the attachments were issued, were due at the time of the commencement of the suits and of the issuing of the attachments, but it appeared that the general terms of the sale of goods by plaintiffs to customers were "five per cent off, cash in thirty days, or two per cent by customers giving their note at four months in settlement of the bills," and the notes had not been given by defendants:

*Held*, that the failure to pay cash in thirty days would not have the effect to make the debts due at that time, but would operate as an election on the part of the buyers to take the credit of four months, and mere neglect to give the notes, without refusal of application for them, would not give the right to immediate action.

A memorandum, as part of the bills of sale showing that the sales were at four months, should control on the question of terms instead of the usage of plaintiffs or entries in their books of sale.

Where it was claimed that debts for goods sold on credit had become presently due because the sales were procured on fraudulent representations, and the only representations alleged were those made to sellers by mercantile agencies of statements made to these agencies by defendants as to their condition generally:

*Held*, that it must be clearly shown that the accused buyer made these statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other seller.

The payment shortly before an assignment for the benefit of creditors, and in contemplation of it, of a debt to a former partner, if actual and honest would be no fraud *per se*, nor would the drawing out by defend-

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Victor *et al.* agt. Henlein *et al.*

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ants, respectively, considerable sums of money from the firm before the assignment and in contemplation of it, if done under a mistake as to their rights and not with intent to defraud creditors, or with a design to conceal property with the purpose of defrauding them, be such a fraudulent disposition of property as to entitle a simple creditor to attachment under the provisions of the Code.

*First Department, General Term, October, 1884.*

*Before DAVIS, P. J., BRADY and DANIELS, JJ.*

APPEALS from orders of special term denying motions to vacate attachments.

*Blumensteil & Hirsch*, for appellants.

*James Dunn*, for respondents.

DAVIS, P. J. — The affidavits in these several cases are all of the same pattern, change of names and amounts being made. They fail to show affirmatively that the debts upon which the suits were brought, and for which the attachments were issued, were due at the time of the commencement of the suits and of the issuing of the attachments. On this ground the several motions to vacate the attachment were granted, but before any order was entered on the decision the plaintiffs on further affidavits applied for a reargument of the motions, which was granted, and on such reargument the motions to vacate were denied. From the orders entered on this decision these appeals are taken. It is insisted by the respondents that the decision of the special term was correct on two grounds :

*First.* That the several debts were due because the terms of the sales of the goods for the purchase of which they were contracted were, "five per cent off, cash in thirty days ; or two per cent off, by defendants giving their note to their own order at four months in settlement of the bills," and that the notes not having been given, the debts became due at the

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*Victor et al. agt. Henlein et al.*

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expiration of the thirty days. These were the general terms of sales of goods by the several plaintiffs to their customers, as appear by their "term books." But these terms, if applicable to these particular debts, gave an option to the buyer to secure five per cent discount by paying cash in thirty days, in default of doing which they were to give their notes at four months and have a discount of two per cent only. The failure to pay cash in thirty days would not have the effect to make the debts due at the end of that time, but would operate as an election on the part of the buyers to take the credit of four months and a discount of two per cent. If on requirement they should refuse after the thirty days expired to give the notes, that refusal might then operate to make the debt due and suable presently for a breach of the condition which requires the notes to be given. There is nothing in the case to show that the defendants refused to give notes or were asked to do so, and mere neglect, without refusal of any application for the notes, can hardly be said to give a right of immediate action, but in this case the bills of sale show that the sales were at four months, two per cent off. A memorandum to that effect is made by plaintiffs upon the bills, and that memorandum, as part of the bills of sale, is to control on the question of terms instead of the usage of plaintiffs or entries in their books of sale. We think the plaintiffs fail to show that by the terms of the contract of sale a right of action had accrued in either of the cases.

The second ground is, that the debts for the goods sold were presently due, because the sales were procured by fraudulent representations. No such fraudulent representations are claimed to have been made to the plaintiffs at the time of the purchase to induce the sales, but it is claimed that misrepresentations were made to mercantile agencies, who furnished the same to the several plaintiffs, and they acted, in dealing with defendants, on the credit of such statements. The defendants appeared to have been for a long time in business with an established credit. The mercantile agencies from

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*Vietor et al. agt. Henlein et al.*

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time to time had entered in their books what are said to be statements substantially made by the defendants as to their capital, stock on hand and condition generally, and these statements were furnished by the agencies to the plaintiffs as their customers. The affidavits on the part of the defendants show, or tend to show, that the alleged statements were not made as reported by the agencies, but that portions of them as made were materially different from the mercantile reports. On looking through the affidavits, it is quite apparent that this ground for claiming the maturity of the debts is an afterthought, not relied upon on the first motion, but growing out of an intimation in the opinion of the court granting the motions to the effect that fraud in contracting the debts might be shown upon the trial to establish that they were due when the suits were brought. We are not satisfied by the affidavits that any such alleged fraud was committed to accomplish the purpose in view. The plaintiff should be held to show in substance that the goods were obtained on credit on false pretenses, otherwise every merchant who buys a bill of goods is at the mercy of the mercantile agencies and liable to immediate suit, arrest and imprisonment for discrepancies which appear between the agency reports and his real condition. Where the only representations made are those furnished to sellers by the agencies, it must be clearly shown that the accused buyer made these statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer. In this case that fact is not so clearly disclosed as to justify us in saying that a fraud was perpetrated through the medium of the agencies of a character sufficient to justify proceedings therefor, either criminal or civil.

The question whether the evidence shows a fraudulent disposition of the property of the defendant sufficient to justify an attachment is a secondary one. The defendants made an assignment for the benefit of their creditors. Within a few weeks before making the assignment they, in contemplation

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of it, paid off a considerable indebtedness owing to a former partner, who had some years previously retired from the firm, leaving his liquidated capital and profits in the business as a loan to the new firm, subject to call. The payment of such a debt, if actual and honest, would be no fraud *per se*. It in that case would be as much a debt of the firm as any other for borrowed money; and, being due presently, could be either paid or preferred, if genuine, at the option of the debtors.

The defendants also, in contemplation of an assignment, and within a few preceding weeks, drew out, respectively, from the firm certain sums of money to meet their individual debts then owing for expenses of living already accrued, and to provide funds for the support of their families for a few months, until they could settle their affairs and resume business in some form. Whether this transaction would evade the assignment when assailed by creditors is one question; whether it is such an actual fraudulent disposition of property as entitled creditors to proceed by attachment or warrant of arrest is quite another. The latter question would depend largely upon the intent or good faith of the debtor, whether he acted upon advice or belief of legal right to make such a withdrawal to meet the exigencies of his family, with no intent to defraud creditors or with a design to conceal property with the purpose of defrauding them. In this case the defendants stated frankly and fully to the creditors what they had done, and seem to have concealed nothing in that regard. The act was a mistake as to their rights, and doubtless an illegal one, but, as shown by the affidavits in this case, we think it was not such a fraudulent disposition of property as entitled a simple creditor to attachment under the provisions of the Code.

We think the motions to vacate the attachments should have been granted, the order appealed from should be reversed, and the motions to vacate granted, with the usual costs and disbursements of appeal and the one motion in the court below.

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The People *ex rel.* Stranahan agt. Thompson.

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## SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JAMES S. T. STRANAHAN, acting president of the board of trustees of the New York and Brooklyn Bridge, agt. HUBERT O. THOMPSON, as commissioner of the department of public works of the city and county of New York, JOHN D. CRIMMINS and others, composing the department of parks of the city of New York.

*New York (city of) — New York and Brooklyn bridge — Right of, to stretch platform over Chatham and Centre streets and to erect pillars in said streets to support same — Mandamus — When will issue to compel commissioner of public works to grant permit to bridge company to enter upon such streets and take up pavements, etc. — Terminus of bridge — Maps filed from time to time does not affect.*

The authority to locate a railroad or other structure at a certain place does not limit the location to the extreme bounds of that place, but carries with it the authority to locate the same within such bounds. On a motion for a peremptory *mandamus* to the commissioner of public works and the department of parks "commanding them forthwith to issue and deliver to the board of trustees of the New York and Brooklyn bridge, a permit to enter upon Chatham and Centre streets in the city of New York, near the Hall of Records, and take up the pavements of said streets, and lay foundations for and erect thereupon the structure proposed by the said trustees to complete the said bridge, as shown on a map filed by said trustees in the register's office in New York city, on the 10th of April, 1884; there were two other maps filed, one in 1874 and one in 1877:

*Held, first*, that the bridge trustees have the legal right to do precisely what they propose to do, as indicated by the map of 1884 (*i. e.*, to occupy Chatham and Centre streets), and that they are not precluded by the filing of the maps of 1874 and 1877, from erecting such a structure as is shown on the map or diagram filed in 1884. The maps filed from time to time do not and could not affect the *termini*.

*Second*. The location of the New York terminus at the west side of Centre street is authorized.

*Third*. That the provisions of the act which declare that the said bridge "shall not obstruct any street which it shall cross, but that such street shall be spanned by a suitable arch or suspended platform as shall give suitable height for the passage under the same, for all pur-

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poses of public travel and transportation," does not refer to the approach to, or the terminus of, the bridge.

*Fourth.* That as it is the legal right of the trustees to enter upon the performance of the work contemplated by them, it is the public duty of the commissioner of public works and the park commissioners to issue the permits asked for and to license the excavations which are necessary to enable the former to prosecute their work, and a *mandamus* is the proper remedy to compel them so to do.

*Special Term, October, 1884.*

*Bergen & Dykman*, attorneys for relators.

*Aaron J. Vanderpoel* and *William N. Dykman*, of counsel.

*E. H. Lacombe*, counsel to the corporation.

*James C. Carter*, counsel for respondents.

LAWRENCE, J.—This is a motion for a peremptory *mandamus* to the commissioner of public works and the department of parks, "commanding them forthwith to issue and deliver to the board of trustees of the New York and Brooklyn bridge a permit to enter upon Chatham and Centre streets in the city of New York, near the Hall of Records, and take up the pavement of the said streets, and lay foundations for and erect thereupon the structure proposed by the said trustees to complete the said bridge, as shown on a map filed by said trustees in the register's office in New York city, on the 10th of April, 1884," &c.

The act entitled "An act to incorporate the New York Bridge Company for the purpose of constructing and maintaining a bridge over the East river, between the cities of New York and Brooklyn, passed April 16, 1867," provides in its tenth section, as follows: "The said bridge shall commence at or near the junction of Main and Fulton streets, in the city of Brooklyn, and shall be so constructed as to cross the river as directly as possible to some point at or below Chatham square, not south of the junction of Nassau and Chatham streets, in the city of New York" (*Laws of 1867, chap. 399*).

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This act was the first act which was passed by the legislature in reference to the construction of a bridge over the East river, and I cannot find that in any of the subsequent acts passed in 1869 (*Laws of 1869, chap. 26*), 1874 (*Laws of 1874, chap. 601*), 1875 (*Laws of 1875, chap. 300*), 1877 (*Laws of 1877, chap. 165*), 1880 (*Laws of 1880, chap. 105*), 1882 (*Laws of 1882, chap. 368*), 1883 (*Laws of 1883, chap. 228*), the location of the terminus of said bridge in the city of New York has been changed or altered. It appears by the affidavit of Mr. Stranahan that Mr. Roebling, the engineer of the original bridge company, surveyed, or had surveyed for him, three lines, and made a report of his proceedings, and that the route which he called the "City Hall route," is described in his report as ending "on Chatham street, near the Hall of Records;" that this report was submitted to a committee of the directors who reported to the board in favor of the City Hall route recommended by the said engineer, which report was adopted on the 24th of October, 1867; that two maps were filed by the New York Bridge Company in the register's office to designate the route of the approach in this city; that such maps showed the location of the bridge, and were respectively filed on the 7th of November, 1874, and the 18th of July, 1877. Mr. Stranahan alleges in his affidavit that both of these maps show the route as extending *beyond* the east line of Chatham street, out into Chatham and Centre streets.

Mr. Kingsley, the president of the trustees of the New York and Brooklyn bridge, in his affidavit, states that the terminus being located by chapter 399 of the Laws of 1867, "at some point at or below Chatham square, not south of the junction of Nassau and Chatham streets," the company was advised that within these limits the terminus must be located by a resolution of its directors, and, accordingly, Mr. John A. Roebling, then engineer of the company, surveyed three lines, and the one which he called the "City Hall route" is described in his report as ending on Chatham street, near the Hall of Records, which report was adopted by the board of

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trustees on the 24th of October, 1867, and that thus the terminus of the bridge in New York was located on Chatham street.

The affidavit of Mr. Clarkson, one of the assistants to the counsel to the corporation, alleges that by the said maps on file, the terminus in New York of the said bridge is fixed and located at or near the intersection of Chatham and Centre streets, and is coincident, or nearly so, with the building line on the easterly side of Chatham street. It is conceded that on the 10th of April, 1884, the board of trustees of the Brooklyn bridge filed a third map in the office of the register, in the city of New York, showing the extension of the said bridge across Chatham and Centre streets, and as before stated, the application now under consideration is for a peremptory *mandamus* commanding the respondent to issue permits to the bridge trustees, to enter upon Chatham and Centre streets, and to take up the pavement of said streets for the purpose of completing said bridge in accordance with the plan shown on said map.

By subdivision 9 of section 316 of chapter 410 of the Laws of 1882, commonly known as the consolidation act, it is provided that the department of public works shall have "cognizance and control" \* \* \* "of paving, repairing and repaving streets, and keeping the same clear of obstructions, and of the relaying of pavement removed for any cause." And by section 322 of the same act, it is provided that the department of public works "shall have cognizance, control and general direction in the relaying of all pavement removed for the purpose of constructing \* \* \* foundations of buildings or other structures \* \* \* or for any other purpose, and no removal of pavement for such purpose shall be made until a permit is first had from the said department." Section 86 of the same act, subdivision 5, gives to the common council "power to regulate the opening of street surfaces," &c.

Pursuant to this authority the common council passed an ordinance that "no pavement in any street in the city of New

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York \* \* \* shall hereafter be taken up, or the paving stones removed therefrom, for any purpose whatever, without the authority of the department of public works, under the penalty of one thousand dollars for each offense" (*See Revised Ordinances, sec. 140*).

By section 354 of the Revised Ordinances, the commissioner of public works and the commissioners of the department of public parks are required, "each in their respective jurisdictions, whenever granting a permit for any excavation, opening or disturbance of the pavement of the carriage-way of any street," &c. (except in cases where such opening, excavation or disturbance shall be directly authorized by law), to require, &c., "a deposit of such sum as shall be deemed sufficient to cover and pay all expenses," &c.

The sections of the consolidation act, and the provisions of the Revised Ordinances, to which I have above referred, seem to be the only general provisions of law which relate to the giving of permits in cases of the opening of the surfaces of streets in this city.

I do not find in any of the acts relating to the construction of the bridge any provisions as to the effect of the filing of a map by the trustees. It is conceded, as has been before stated, that prior to the filing of the map on the 10th of April, 1884, two maps had been filed by the trustees, neither of which shows the terminus of such bridge in the city of New York as it is now shown upon the map filed in 1884.

The maps filed in 1874, and in 1879, do, however, show a prolongation of the line of the bridge extending, if not beyond Chatham street, certainly beyond the easterly line of said thoroughfare. Neither of these maps shows the precise form of the terminus of the bridge, nor the form of the structure by which it was to be approached or entered upon, and as I cannot find that the acts relating to the bridge prescribe that when a map has been filed, showing the general line of the structure, the trustees are thereby precluded from filing another map, showing in detail the approach to the bridge, I

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see no reason, as that approach is within the limits prescribed by section 10 of the act of 1867, to wit, "at a point at or below Chatham square, and not south of the junction of Nassau and Chatham streets," why the trustees are not acting within their legal powers in filing such map, and in erecting or attempting to erect, the approach to, or exit from, the bridge at the place shown on said map. The affidavits presented upon this motion state that a map showing specifically the extent of the approach to the bridge, was not filed before the month of April of this year, because the trustees were under an injunction, procured by the New York Elevated Railroad Company, restraining the bridge authorities from constructing or erecting the approach at any point farther west than the easterly line of Chatham street. That injunction, it appears, has now been dissolved, and it is alleged that the bridge trustees are but exercising their legal powers in filing the map of 1884.

An examination of the various acts relating to the bridge will, I think, clearly show that the trustees have the power to locate the terminus of, or approach to, the bridge, in the manner and at the point indicated on the map of April, 1884. And if they have such power, it would seem that the commissioners of public works (and the park commissioners who have been made parties to this proceeding, because there is a small triangle in the street proposed to be taken, which may come under the jurisdiction of that department) should grant a permit or permits to the trustees to take up the pavement necessary to be removed in constructing the terminus to the bridge.

The cases referred to by the relator's counsel seem to establish the proposition that the authority to locate a railroad or other structure at a certain place, does not limit the location to the extreme bounds of that place, but carries with it the authority to locate the same within such bounds (*see People agt. Brooklyn, Flatbush and C. I. R. R.*, 89 *N. Y.*, 75; *Farmers' Turnpike Company agt. Coventry*, 10 *Johns.*, 389; *Mohawk Bridge Company agt. The Utica and Schenectady R. R. Co.*,

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6 *Paige*, 554; *Mason* agt. *Brooklyn City and Newtown R. R. Co.*, 35 *Barb.*, 377).

The affidavits read on the part of the relator show that it always was part of the plan of the engineers to cross Chatham and Centre streets, and it is claimed, and as I think, correctly, that the maps filed prior to 1884 show that it was the intention of the trustees to occupy Chatham and Centre streets, but that the maps omitted to show the style of the structure, which omission was supplied by the map of 1884.

I am of the opinion, therefore, that the bridge trustees have the legal right to do precisely what they propose to do, as indicated by the map of 1884, and that they are not precluded by the filing of the maps of 1874 and 1877 from erecting such a structure as is shown on the map or diagram filed in 1884. I do not agree with the counsel for the respondents that the provision of the act which declares that the said bridge "shall not obstruct any street which it shall cross, but such street shall be spanned by a suitable arch or suspended platform as shall give suitable height for the passage under the same for all purposes of public travel and transportation," refers to the approach to, or the terminus of, the bridge. If the construction of the Act of 1867 (*see sec. 10 of Act of 1867*), which is contended for by the learned counsel, is correct, the terminus at the point at or below Chatham square, and not south of the junction of Chatham and Nassau streets, in the city of New York, would necessarily be a terminus elevated above the streets. The great question in my mind, in this case, is as to the form of the remedy which is invoked by the relator. If it be conceded that the trustees under the acts relating to the bridge, have the power to locate its terminus at the point indicated by the map of April, 1884, it would seem that they did not require any permit from the city authorities. If they have the power under the statute of the state, that power is exclusive, and does not require for its exercise the permit or consent of the said authorities.

It is claimed, however, on the part of the relator, that the

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employees of the trustees have been arrested by the police while attempting to carry out the instructions given to them, and such being the case, it is claimed that a *mandamus* should issue to prevent any possibility of a conflict ensuing between those employees and the authorities of the city.

Upon reflection, I am of the opinion that as it is the legal right of the trustees to enter upon the performance of the work contemplated by them, it is the public duty of the respondents to license the excavation which is necessary to enable the former to prosecute their work, and the cases which are cited upon the relator's brief seem to establish the soundness of this view (*See People agt. Tremaine*, 17 How. Pr. R., 10; *People agt. Perry*, 13 Barb. Sup. Ct. R., 206; *Rex agt. Comm'rs*, 2 Term Rep., 381; *Rex agt. Cookson*, 16 East, 376; *Rex agt. Comm'rs of Liverpool*, 2 M. & S. [Selden], 223; *Smith agt. Comm'rs of Portage*, 12 Ohio Rep., 54; *Boon agt. Todd*, 3 Miss., 140; *Commonwealth agt. Justices*, 2 Va. C., 9; *Ex parte Jennings*, 6 Cow., 418; *Menden agt. Wooster*, 10 Pick., 235; *People agt. Champion*, 16 Johns., 61; *People agt. Collins*, 19 Wend., 26; *People ex rel. Cornell agt. Norton*, 12 Abb. Pr. [N. S.], 47).

The motion that a peremptory *mandamus* issue must therefore be granted. The order will be settled on two days' notice.

NOTE. — Affirmed by general term November, 1884, on foregoing opinion, no opinion being written by general term. — [Ed.]

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Davenport Glucose Company agt. Taussig *et al.*

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SUPREME COURT.

DAVENPORT GLUCOSE COMPANY, respondents, agt. ISAAC W.  
TAUSSIG *et al.*, appellants.

*Examination before trial of a party charged with fraud—When and to  
what extent allowed — Privilege as to questions which may criminate.*

In an action to recover the possession of personal property, the defendants, though charged with fraud, may nevertheless be examined before trial, where the object is to ascertain the quantity of goods that came into their hands, the time the goods were received, the time of their transfer to another party, etc., and if questions are put which defendants claim that they are not bound to answer, on the ground that they may criminate themselves, they may assert the privilege, and it is for the judge to determine whether the questions should be answered.

*First Department, General Term, August, 1884.*

*Before DAVIS, P. J., DANIELS and HAIGHT, JJ.*

APPEAL from order denying motion to set aside order for examination of the defendants.

*W. C. Hippenheimer*, for appellants.

*A. P. Whitehead*, for respondents.

DAVIS, P. J. — This is an appeal from an order of the special term denying motion to vacate an order directing examination of defendants before trial. The action is to recover possession of personal property, to wit, 250 barrels of glucose alleged to have been sold by the plaintiffs to the defendants Taussig and Hammerschlag, who subsequently made a general assignment to the defendant Barricklo for the benefit of their creditors. The plaintiff replevied 107 barrels of glucose. It is alleged that the sale and possession were fraudulently obtained.

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Davenport Glucose Company agt. Taussig *et al.*

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It must be conceded that the authorities in this district, on the question of the right to make an order for the examination of parties in an action where the plaintiff's cause of action is for an alleged fraud, are somewhat in conflict. There is no case, however, we think, that holds in an action to recover possession of personal property, where the object is to ascertain from the defendants the quantity of goods that came into their hands and the time when they received the same, and the time of making the sale or transfer of the same to another party, and the quantity delivered to him, &c., that such matters are not proper subjects for this preliminary examination.

In this case the assignee of the purchasers, Barricklo, who is not sought to be charged with fraudulent conduct, received the goods from the defendants. No reason can be imagined why he may not be called and examined as to when and where he received the same, and to what amount, and to prove whatever might be necessary touching the assignment to him of the goods by the other defendants, and the disposition that may have been made thereof. It can hardly be conceived that his answers to such an examination can be supposed to subject him to a charge of fraud.

In respect of the other defendants, it is very obvious, as it seems to us, that many questions may be asked which they will be bound to answer if called upon the trial, and if in the course of such an examination as this questions may be asked which they decline to answer, on the ground of their privilege, their rights are precisely the same as they would be upon the trial if the same questions were put to them there. They are not bound to criminate themselves, and may claim the personal privilege of refusing to answer. On such an examination it would be for the judge to determine, as it would be on a trial at circuit, whether the questions are such as they are not bound to answer. But the fact that some such questions may be put does not seem to be a good reason for holding that a party cannot be examined at all in an action of this kind.

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Matter of Smith.

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The cases referred to by the learned counsel for the appellants do not go far enough, we think, to require us to hold that they determine this case adversely to the respondents.

We see no ground, therefore, for interfering with the order of the court below, and it should be affirmed, with ten dollars costs and disbursements.

DANIELS and HAIGHT, JJ., concurred in the result.

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## SUPREME COURT.

In the Matter of the Petition of MATTHIAS B. SMITH, to vacate assessment for laying an additional course of flagging on Eightieth street, from Fifth to Madison avenues.

*Assessment and taxation—When court precluded from vacating assessment in city of New York—Laws of 1880, chapter 550, section 12—Consolidation Act, section 903.*

If the ordinance for the pavement of a street is passed without authority of law, the execution of the work can be prevented by appropriate application to the court. A party not having availed himself of his legal rights in that respect is precluded by section 903 of the Consolidation Act from asking to have the assessment vacated.

Where there is nothing by which the court can determine the extent to which an assessment has been increased by reason of fraud or substantial error; under section 903 of the Consolidation Act it can neither vacate nor reduce an assessment.

*Special Term, April, 1884.*

LAWRENCE, J.—I cannot distinguish this case from that of *Isabella Garvey* (77 N. Y., 523), but under the act, chapter 550 of the Laws of 1880, it would seem that the court is precluded from vacating the assessment; nor can I reduce the amount, because there is nothing by which I can determine the extent to which the assessment has been increased by reason of the fraud or substantial error (*See decision of court of appeals in Matter of Mead*, 74 N. Y., 216).

After reargument, I still adhere to the opinion that I cannot vacate this assessment. Section 875 of the Consolidation

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Matter of Smith.

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Act is taken from section 115 of the charter of 1873. Section 903 of said act is substantially taken from section 12, chapter 550 of the Laws of 1880. If there is any inconsistency between the two provisions, the latter section must prevail, and I agree with the counsel to the corporation that there is not necessarily any inconsistency between the two sections. If the ordinance for the pavement in question was passed without authority of law, the execution of the work could have been prevented by appropriate application to the court. Not having availed himself of his legal rights in that respect, I think the petitioner is precluded by section 903 from asking to have the assessment vacated. The language of that section is extremely explicit. "No court shall vacate or reduce any assessment, in fact or apparent, confirmed after June 9, 1880, whether void or voidable, on any property for any local improvement hereafter completed, otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause." As I said in my previous memorandum (*see Register, March 10, 1884*), there is nothing by which I can determine the extent to which the assessment has been increased by reason of the fraud or substantial error. Therefore, under section 903, I can neither vacate nor reduce the assessment. If the petitioner is right this is an apparent assessment, and a void assessment; and the section aforesaid, where the assessment is laid after June 9, 1880, only authorizes a reduction in such cases to the extent that the assessment has been increased in dollars and cents by reason of fraud or substantial error. Motion for a reargument denied, with costs.

NOTE. — Affirmed by general term, November, 1884, on foregoing opinion, no opinion being written by general term.—[ED.]

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In the Estate of Julia O'Brien, deceased.

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SURROGATE'S COURT.

In the Estate of JULIA O'BRIEN, deceased.

*Administrators — Qualification of — Disqualification of person convicted of infamous crime — Prohibition extends only to persons convicted in this state — Persons incompetent by reason of improvidence — Conviction for larceny in a foreign jurisdiction — No evidence of.*

The statute prescribing the qualifications of administrators (*sec. 32, tit. 2, chap. 6, part 2, R. S., [3 Banks, 7th ed.], 2291*) forbids the issuance of letters to "a person convicted of an infamous crime:"

*Held*, that this prohibition extends only to persons convicted within the state of New York.

The same statute provides that "no letters of administration shall be granted \* \* \* to any person who shall be judged incompetent by the surrogate to execute the duties of such trust by reason of improvidence."

*Held*, that a conviction for larceny in a foreign jurisdiction is no evidence that the person convicted is "incompetent by reason of improvidence."

*New York county, October, 1884.*

ROLLINS, S. — Of the two persons who are applicants for letters of administration in this estate, one a son of decedent, the other a grandson, the former is, of course, entitled in priority, unless he is for some cause disqualified. Evidence has been submitted tending to show that he has been convicted in the state of New Jersey of the crime of larceny, and it is insisted that by such conviction he has become incapacitated from receiving letters. The statute which is claimed to create such disqualification is in words following: "No letters of administration shall be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, \* \* \* nor to any person who shall be adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding" (*Sec. 32, tit. 2, chap. 6, part 2, Rev. Stat. [3 Banks, 7th ed.], 2291*).

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In the Estate of Julia O'Brien, deceased.

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Upon the facts here presented two questions arise for determination :

1. Does one, by reason of his conviction of an offense against the laws of a foreign state, ever become "a person convicted of an infamous crime," within the meaning of the statute above quoted ?

The signification of the term "infamous crime," wherever that expression occurs in our statutes, is absolutely fixed by section 31, chapter 1, title 7, part 4, Revised Statutes (3 *Banks*, 7th ed., 2539). It is there declared that "whenever the term *infamous crime* is used in any statute it shall be construed as including every offense punishable with death, or by imprisonment in a state prison, and no other." It follows, therefore, that the first clause of section 31, which prescribes the qualifications of administrators, must be construed precisely as if it were thus worded: "No letters of administration shall be granted to a person convicted of a crime punishable by imprisonment in a state prison." This translation, so to speak, of the language of the section makes very apparent the embarrassment that must attend any interpretation whereby a conviction without this state would be accorded the same force and effect as a conviction within its limits. Surely nobody would contend that the legislature had, by this enactment, meant to provide that a person should be rendered absolutely incompetent to receive letters of administration merely by his conviction in a foreign jurisdiction of a crime *there* punishable by death or by imprisonment in a state prison. Such an interpretation would subject the qualifications of administrators here appointed to restrictions that might sometimes be oppressive and unjust. It is possible, of course, that acts which would here be deemed not simply innocent, but positively meritorious, might fall under such severe condemnation of the laws of some foreign power as to be punishable in that jurisdiction by imprisonment or death. It is necessary, therefore, in order to bring foreign convictions within the purview of the statute under consideration, to

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In the Estate of Julia O'Brien, deceased.

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interpret that statute as if it were couched in some such language as this: "Letters of administration shall be granted to no person who has been convicted of a crime *which would, if committed in this state, be here punishable* by imprisonment or death." Against any such interpretation, however, it can be urged with great force that it necessitates an unwarrantable introduction into the statute of words which form no part of it and of an idea which its language does not fairly suggest. If the legislature had intended to give to foreign convictions the force and effect of convictions within the state, it would not have been difficult to make that intention clear and unequivocal. In the very revision of which the section now under consideration forms a part, a careful discrimination in this regard was made by the legislature in defining criminal offenses and prescribing punishment therefor. Section 8, title 7, chapter 1, part 4, Revised Statutes (3 *Banks*, 7th ed., 2536), declares: "*If any person convicted of any offense punishable by imprisonment in a state prison shall \* \* \* subsequently be convicted of any offense \* \* \* he shall be punished as follows,*" &c. That this provision was deemed too narrow to include extra-territorial convicts is evidenced by the contemporaneous enactment of section 10 of the same title (3 *Banks*, 7th ed., 2537), which declares that "every person who shall have been convicted in any of the United States or in any district or territory thereof, or in any foreign country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in a state prison, shall, upon conviction for any subsequent offense committed within this state, be subject to the punishment herein prescribed upon subsequent convictions in the same manner and to the same extent as if such first conviction had taken place in a court of this state."

Upon comparing section 8, above quoted, with that which prescribes the qualifications of administrators (bearing in mind the statutory definition of "infamous crime") it will appear that the two provisions are substantially identical. If,

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In the Estate of Julia O'Brien, deceased.

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therefore, the legislature had intended that any extra-territorial conviction should operate as a disqualification of an administrator, it is likely, it seems to me, that the provisions of the statute creating such disqualification would have been supplemented by some such enactment as section 10, above quoted. Apart, therefore, from other grounds which impel me to the same conclusion, I should for this cause alone feel disposed to hold that the mere fact of conviction for crime can never *ipso facto* incapacitate a person from becoming an administrator, unless such conviction has been had in the courts of this state.

The correctness of this conclusion is emphasized by a consideration of the second clause of the statute which is here in question. That clause provides that letters of administration shall issue to no one "incapable by law of making a contract." Manifestly this incapacity is limited to incapacity under the laws in force within this state; any other construction would be palpably absurd. By parity of reasoning, incapacity because of conviction for crime may well be regarded as limited to convictions under and by the laws of the state of New York.

The recent decision of the court of appeals, in the case of *Sims* agt. *Sims* (75 N. Y., 466), subsequently approved in *National Trust Company* agt. *Gleason* (77 N. Y., 400), has an important bearing upon the question here at issue, if indeed it should not be regarded as decisive of it. The determination of those cases involved the interpretation of section 23, title 7, chapter 1, part 4, Revised Statutes (3 Banks, 6th ed., 994). "No person," says that section, "*sentenced upon a conviction for felony* shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned, &c. It was held by the court of appeals, judge RAPALLO pronouncing its opinion, that the disqualification to testify which was created by that statute was restricted in its operation to persons convicted and sentenced under the laws of the state of New York. Some of the reasons by which that conclusion is supported are not strictly applicable here, but

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there are others which have exact application, and all in all there is a very close analogy between the statute reviewed in *Sims* agt. *Sims* and the one which prescribes the qualifications of administrators.

For these reasons I feel bound to hold that Daniel O'Brien's conviction in New Jersey of the crime of larceny does not necessarily disqualify him from becoming an administrator in New York.

2. There remains to be considered the question whether the surrogate has discretionary power, even though the New Jersey conviction does not as of course work a disqualification, to refuse, because of such conviction, the issuance to O'Brien of letters of administration.

It has been repeatedly determined by the courts of this state that the withholding of letters from a person who, if not by some cause incapacitated, would be entitled in priority under the statute, is never justifiable save in cases where such person is declared to be disqualified by the statute itself (*Coope* agt. *Lowerre*, 1 *Barb. Ch.*, 45; *Emerson* agt. *Bowers*, 14 *N. Y.*, 449).

The only statutory provision which can possibly be applicable to the case at bar is that which forbids the issuance of letters to one "who shall be adjudged by the surrogate incompetent to execute the duties of his trust by reason of improvidence." This presents the question whether one's conviction of larceny can ever of itself afford satisfactory evidence of his incompetency by reasons of improvidence, a question which has been answered more than once by our appellate tribunals. In the case of *Coope* agt. *Lowerre*, above cited, the chancellor said, in reviewing a decision of a former surrogate of this county:

"No degree of legal or moral guilt or delinquency is sufficient to exclude a person from administration as next of kin in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime." \* \* \* (This exception, as I have already decided, only includes

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In the Estate of Julia O'Brien, deceased.

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persons convicted in this state.) "The *improvidence* which the framers of the Revised Statutes had in contemplation as a ground of exclusion is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value in case administration thereof should be committed to such improvident person. The principle of exclusion in this part of the statute is based upon the well known fact that a man who is careless and improvident, or who is wanting in ordinary care and forecast in the acquisition and preservation of property for himself, cannot with safety be intrusted with the management and preservation of the property of others. *The fact that a man is dishonest, and seeks to obtain the possession of the property of others by theft, robbery or fraud, is not evidence either of his providence or of his improvidence.* The dishonest man, who preys upon the rights of others and deprives them of their property by unlawful means, may be, and frequently is, not only careless, but reckless in squandering the property which he has thus acquired. Or he may, on the other hand, preserve and hoard up his ill-gotten gains with all a miser's care."

The decision of the court of appeals in *McMahon* agt. *Harrison* (6 N. Y., 443) is not in conflict with the decision just quoted. In the trial below, the surrogate had decided upon the authority of *Coope* agt. *Lowerre* (*ante*), that a professional gambler was not as such *improvident* within the meaning of the statutes declaring the qualifications of administrators. This judgment was subsequently reversed by the supreme court (*McMahon* agt. *Harrison*, 10 Barb., 659). That court announced its adherence to the proposition that, under the provisions of the statute, "vices and moral delinquency cannot of themselves disqualify a person to act as administrator;" but it decided, nevertheless, that a professional gambler, whose habitual occupation it was to put large sums of money at hazard upon games of chance, was, in the nature of things, an improvident person.

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Muser agt. Lissner

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This view was subsequently approved by the court of appeals (6 *N. Y.*, 443). The pursuit of gambling was pronounced as in itself a token of improvidence, but the general doctrine of *Coope* agt. *Lowerre* was unhesitatingly approved (*See, also, Emerson* agt. *Bowers*, 14 *N. Y.*, 440).

In view of these decisions I cannot, upon the evidence before me, find that O'Brien is incompetent by reason of improvidence to become administrator of this estate.

Letters may issue.

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## SUPREME COURT.

FREDERICK MUSER, appellant, agt. JULIUS LISSNER, respondent.

*Attachment — When should not be vacated because part of claim sued on was not due at time of commencement of action.*

Where it appears by the papers that the claim sued on was fraudulently contracted, the whole debt becomes due by operation of law, and it is error in such a case to vacate an attachment because the term of credit had not expired.

*First Department, General Term, November, 1884.*

*Before DAVIS, P. J., BRADY and DANIELS, JJ.*

APPEAL from an order vacating attachment.

*Blumenstiel & Hirsch, for appellant.*

*Kurzman & Yeaman, for respondent.*

PER CURIAM. — The attachment issued in this action was predicated of the charge that the defendant had removed and disposed of his property with intent to defraud his creditors. In answer to this charge, upon motion to vacate the attachment, it was insisted by the defendant that a part of the claim involved was not due, and the learned justice and the court below declared that the motion should be granted, inasmuch

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McArthur agt. Commercial Fire Insurance Company.

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as it appeared that a considerable amount of the debt sued for was not due at the time of the commencement of the action. In response to this it was shown by the papers that the debt was fraudulently contracted, the defendant having obtained credit upon representation of solvency that turned out to be untrue. When that fact appeared the whole debt became due by operation of law. This is a familiar principle, which has been declared not only by this court but by the court of appeals in several cases. For these reasons we think the order appealed from should be reversed, with ten dollars costs and disbursements.

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### CITY COURT OF NEW YORK.

JOHN L. McARTHUR agt. THE COMMERCIAL FIRE INSURANCE COMPANY.

*Preference on calendar — Right to — Code Civil Procedure, sections 791-793.*

When an action is brought upon a judgment rendered in a chancery court in the state of Tennessee in an action on a policy of fire insurance on motion for a preference on the calendar:

*Held*, that the action being against a corporation, and founded upon a judgment, which is an evidence of debt for the absolute payment of money, the right to a preference appears upon the face of the pleadings, and is absolute without any qualification or condition of any kind. It is a right given by statute, which no court can by rules or otherwise limit or abridge.

*General Term, October, 1884.*

*Before McADAMS, C. J., NEHRBAS and BROWNE, JJ.*

APPEAL from order made at special term denying an application for a preference on the trial calendar.

*C. W. Moulton and Miron Winslow, for appellant.*

*G. A. Clement, for respondent.*

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McArthur agt. Commercial Fire Insurance Company.

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BY THE COURT. — The action is brought upon a judgment rendered in favor of the plaintiff and against the defendant, on the 30th day of May, 1884, in the chancery court of Davidson county, in the state of Tennessee, for \$628.77, in an action on a policy of fire insurance issued by the defendant to the plaintiff and one W. N. Allen, as copartners. Issue was joined in that action, and after a trial on the merits the aforesaid recovery was had. It is said by the defendants that the chancery court of Davidson county is possessed of equitable jurisdiction only, and that the judgment is therefore not enforceable. But the complaint alleges that said court was and is a court of original jurisdiction in said county of Davidson and said state of Tennessee, empowered by the laws of said state to exercise general jurisdiction in actions of the kind and character mentioned, and their allegations are sufficient to admit proof of the facts alleged.

The plaintiff moved for a preference on the calendar under section 791 of the Code, which, among other things, provides: "Civil actions are entitled to preference among themselves in the following order."

Subdivision 8 of said section reads as follows: An action against a corporation founded upon a note or any other evidence of debt for the absolute payment of money.

The present action is against a corporation, and is founded upon a judgment, which is an evidence of debt for the absolute payment of money (*See cases cited upon the appellant's brief*).

Section 793 provides that where a right to a preference depends upon facts which do not appear in the pleadings or other papers upon which a cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court or the judge thereof upon notice to the adverse party.

But where, as in this case, the right to the preference appears upon the face of the pleadings, the right is absolute without qualification or condition of any kind. It is a right

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Reichenbach agt. Winkhaus *et al.*

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given by statute which no court can by rules or otherwise limit or adjudge.

It follows that the order appealed from must be reversed, with costs, and the application for a preference must be granted.

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### N. Y. COMMON PLEAS.

M. L. REICHENBACH agt. FREDERICK WINKHAUS *et al.*

*Assignment — When void, and will be set aside as such.*

An insolvent assignment reserving to the assignor power of revocation, is void in judgment of law.

Any purpose of the assignor which would render the assignment legally fraudulent if contained in the deed, is equally effective if shown by other proof.

The deposit of the assignment with a stranger, after complete execution, to hold until receipt of further orders from the assignor, or to file when, in the judgment of the depository, it should be for the best interests of all creditors, is a clear reservation of the power to revoke, rendering it void.

*Equity Term, June, 1884.*

ACTION by judgment creditor to set aside general assignment for the benefit of creditors.

It appeared from the evidence that the assignor, Spethmann, being insolvent, and intending to go to Europe to see his creditors, executed an assignment for the benefit of his creditors, without preferences, which was dated and acknowledged by both the assignor and assignee on March 19, 1883. The instrument contained the usual acceptance of the trust by the assignee. The assignment was not delivered at the time, and was not intended by the parties to take effect as an assignment on the date thereof, but was retained by the assignor and by him handed to his attorney, with the express direction to keep it until further orders from him, or until

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Reichenbach agt. Winkhaus *et al.*

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said attorney thought necessary to file it for the best interest of all the creditors. The assignor sailed for Europe on March 21, 1883, and immediately thereafter the plaintiffs began an action and obtained an attachment therein against the property of the debtor Spethmann, on the ground of his non-residence. After the levy of the attachment the assignment was first delivered by the assignor's attorney to the assignee, and was thereupon filed. The attachment was subsequently vacated on technical grounds. It appeared also that the whole stock in trade of the assignor had, prior to the assignment, been consigned to the firm of which the assignee was a member, and was held by them for sale on commission and as security for advances made thereon.

*Frankenheimer & Rosenblatt*, for plaintiffs.

*Chamberlain, Carter & Hornblower*, for defendant Winkhaus.

*Henry Grasse*, for defendant Spethmann.

BEACH, J. — A prompt decision of this case seems desirable, because, if postponed, long delay will unavoidably result. For that reason my conclusion is briefly stated without argument. An insolvent assignment, reserving to the assignor power of revocation, is void in judgment of law (*Riggs agt. Murray*, 2 Johns. Ch., 565; *S. C.*, 15 Johns., 571). Any purpose of the assignor which would render the assignment legally fraudulent if contained in the deed, is equally effective if shown by other proof (*Gasherle agt. Apple*, 14 Abb. Pr. R., 64). The deposit of the assignment with a stranger, after complete execution, to hold until receipt of further orders from the assignor, or to file when, in the judgment of the depository, it should be for the best interest of all creditors, is a clear reservation of the power to revoke, rendering it void. There may be another reason, in that no immediate delivery, followed by an actual and continued change of possession of the

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Selligman *et al.* agt. Wallach *et al.*

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assigned estate, did or under the circumstances could take place. The title to the property passed upon execution by the assignor and acceptance by the assignee (*Cruat* agt. *Sedgwick*, 1 *Barb.*, 210; *Butler* agt. *Stoddard*, 7 *Paige*, 163; *S. C.*, 20 *Barb.*, 505).

Decree for plaintiff, with costs.

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### N. Y. SUPERIOR COURT.

JAMES SELLIGMAN *et al.* agt. ABRAHAM WALLACH *et al.*

*Supplementary proceedings—Examination of debtors who have made an assignment for the benefit of creditors not to be restricted to property acquired since the assignment—Code of Civil Procedure, sections 2435, 2436, 2460.*

The examination of debtors in supplementary proceedings, who had made an assignment for the benefit of creditors should not be restricted to property acquired by them since the assignment, but may cover an inquiry "concerning their property," whether equitable or legal, including their property transferred to another with the apparent intent to hinder, delay or defraud their creditors.

*Special Term, October, 1884.*

O'GORMAN, J. — Defendants being examined in supplementary proceedings under section 2435 of the Code, claim that the examination should be restricted to questions relating to property acquired since the general assignment for the benefit of creditors. In this assignment the wife of one of the defendants and the daughter of the other defendant are preferred to amounts reaching in the aggregate \$82,000, constituting the bulk of the assets of the defendants. I do not think that such a restriction would be proper. The sections of the Code authorizing the examination of a judgment debtor provides that he may be required to attend and be examined "concerning his property" (*Secs.* 2435, 2436). The attitude of the parties in such cases is this: the creditor

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Selligman *et al.* agt. Wallach *et al.*

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has exhausted the ordinary remedies and means to collect his debt — by judgment and execution — neither the sheriff nor he can discover any property subject to levy without examination of the debtor himself. The law gives the creditor the right to examine the debtor “concerning his property,” meaning thereby such property as could not be discovered, and which has been overlooked or hidden or put beyond the reach of creditors. It is an inquisitorial proceeding and was meant to be so.

An assignment for the benefit of creditors, so-called, is too frequently an expedient of dishonest debtors and in order to hinder, delay and defraud creditors, and when made with that intention, the title to the property does not vest in the assignee, but is still, in equity, the property of the debtor and subject to levy under execution. The claim that the mere fact of the debtor's having made a general assignment of his property, stops all further inquiry on the part of the creditor in these proceedings, seems to me untenable and inconsistent with the manifest purpose of these proceedings. Such seems to be the opinion of the court of appeals in *Lathrop agt. Clapp* (40 *N. Y.*, 33). In *Mechanics and Traders' Bank agt. Healy* (14 *Weekly Dig.*, 120), the creditor was allowed to show by examination of the debtor in supplementary proceedings that a purchase of the debtor's property was not made in good faith. Property of the judgment debtor, which had become vested in the assignee under a valid assignment, cannot, of course, be reached by these proceedings. It had ceased to be the property of the debtor. But if the assignment bears on its face, or in the circumstances of its execution, any of the ordinary and manifest indications of fraud, then by examination of the judgment debtor it can be shown that the assignment is not valid. The question whether or not the assigned property is not still the property of the debtor is in doubt, and the examination may be directed to that inquiry.

The provisions of section 2460 of the Code, which protect the judgment debtor against the use of his evidence of his

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Hurd agt. Hannibal and St. Joseph Railroad Company.

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own complicity with any fraudulent transfer of his property in criminal proceedings against him, seemed further to sustain the opinion I have above expressed, and I hold, for the purposes of this motion, that the examination of the defendants in this case must not be restricted to property acquired by them since the assignment, but may cover an inquiry "concerning their property," whether equitable or legal, including their property transferred to another with the apparent intent to hinder, delay or defraud their creditors. The scope, and extent, and nature, and mode of that examination must be subject to the control and direction of the judge or referee before whom the examination is taken.

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### SUPREME COURT.

JOHN HURD, appellant, agt. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, respondent.

*Undertakings on appeal — Guaranty of, by Fidelity and Casualty Company of New York, approved.*

The Fidelity and Casualty Company of New York, under the authority of chapter 486 of the Laws of 1881, being incorporated under the general laws of the state, and authorized to transact business by way of guaranteeing the fidelity of persons holding positions of public or private trust, have authority to guarantee bonds or undertakings on appeal, subject to judicial approval.

The act has necessarily so far modified the provisions of the Code of Civil Procedure, requiring two sureties in such an undertaking, as to dispense with them when a guaranty of this description may be given.

It is error for the court to refuse to permit the plaintiff to examine the officer of the company as to its liability to enter into and make the guaranty before approving or disapproving of the undertaking.

*First Department, General Term, July, 1884.*

*Before DAVIS, P. J., BRADY and DANIELS, JJ.*

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Hurd agt. Hannibal and St. Joseph Railroad Company.

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APPEAL from an order allowing and accepting the guaranty of the Fidelity and Casualty Company of New York as bail upon an undertaking given on an appeal from a judgment to the court of appeals.

*L. B. Bonnell*, for appellant.

*Thomas S. Moore*, for respondent.

DANIELS, *J.* — The undertaking is in the form prescribed by the Code of Civil Procedure on an appeal from a judgment to the court of appeals. It was given and executed by the defendant in its corporate capacity, and added to or indorsed upon it was a guaranty of the Fidelity and Casualty Company of New York, by which it guaranteed the performance of the covenants and conditions of the within bond. This guaranty was taken under the authority of chapter 486 of the Laws of 1881, by which any surrogate, judge, sheriff, district attorney or any other officer having authority or required to approve of the sufficiency of any bond or undertaking, may in his discretion accept a bond and undertaking and approve the same, whenever its conditions are guaranteed by a company duly organized or authorized to do business under the laws of this state, and guarantee the fidelity of persons holding positions of public or private trust, and vesting such corporation with full power to guarantee such bonds and undertakings. This language was clearly so broad as to include the undertaking given upon the appeal in this action ; and as the company was a corporation having authority to guarantee the fidelity of persons holding positions of public or private trust, it was by this act empowered to make the guaranty it did of this undertaking. The act has been objected to as not being sufficiently broad in its title to justify the enactment. It is entitled an "Act to facilitate the giving of bonds required by law." But as bonds and undertakings are to a very great extent understood to be convertible terms, the title of the act was not materially deficient. But if it had been it would be

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of no importance for the reason that the act is neither a private nor a local law.

The power and ability of the company to act in this capacity was made the subject of investigation by the general term of this department, and as it appeared to be incorporated under the general laws of the state, and authorized to transact business by way of guaranteeing the fidelity of persons holding positions of public or private trust, this authority to guarantee bonds or undertakings subject to judicial approval was found to exist, and it was accepted as competent for that purpose.

This act has necessarily so far modified the provisions of the Code of Civil Procedure requiring two sureties in such an undertaking, as to dispense with them when a guaranty of this description may be given. That was clearly its object as to all bonds and undertakings. It was to substitute the guaranty of the bond in place of the liability and obligation of the sureties otherwise required by law.

The court refused to permit the plaintiff to examine the officer of the company as to its liability to enter into and make the guaranty. This, we think, was erroneous. When the specific objection was overruled further proceedings should have been taken to examine the officers on behalf of the respondent, if he so desired, and thereupon the court should have approved or disapproved of the undertaking.

The order should be modified accordingly, and as so modified affirmed, without costs.

DAVIS, P. J., and BRADY, J., concurred.

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In the Estate of John R. Marshall, deceased.

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SURROGATE'S COURT.

In the estate of JOHN R. MARSHALL, deceased.

*Will — Construction of — Executors — When not precluded from enforcing a claim to statutory commissions.*

A testator by his will appointed A. B. and C. his executors. The will contained a provision in substance, as follows: "It is my request that A. B. and C. will consent to act as executors, and that each of them other than A. do also take and receive the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them."

*Held*, that A. was not precluded by the language above quoted from enforcing a claim to be awarded the statutory commissions, even though the statutory commissions awardable under the law in force when the will was executed were precisely what the testator provided for each of his executors other than A.

*New York county, November, 1884.*

ROLLINS, S. — By his will, dated June 20, 1873, this testator appointed his wife, Eveline G. Marshall, his executrix, and James P. Kernochan and John A. Kernochan his executors. He subsequently added to this list, by a codicil executed February 18, 1881, the name of John J. Wysong. On April 20, 1881, the testator died. Between that date and October twenty-eight next following, the surrogate issued letters testamentary to each of the four persons entitled thereto.

A decree judicially settling and determining the accounts of the executors is now about to be entered, and the question arises whether any provision should be made therein for payment of commissions to Mrs. Marshall. The account itself contains a statement verified by the oaths of all the executors to the effect that the executrix has never actively participated in the management of the estate. This allegation is denied by one of her objections and is pronounced to be "incorrect and misleading." The referee, to whom were submitted the

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In the Estate of John R. Marshall, deceased.

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various issues of the accounting, found by his report that none of Mrs. Marshall's objections were well taken. He did not refer specifically to that one of them which relates to the character and extent of her services as executrix, and for that reason, perhaps, none of her exceptions to the report make any reference to such objection.

Under these circumstances it is insisted that the surrogate in deciding, as he did decide several months since, to confirm in all things the referee's report, has already passed adversely upon the very claim which is here set up in behalf of Mrs. Marshall.

This position may perhaps be technically correct, though upon several grounds even its technical correctness may well be doubted. But in view of the fact that the surrogate did not discover until after announcing his decision, that the question of Mrs. Marshall's right to commissions was involved, or was claimed to be involved, in the proceedings before the referee, and did not intend in declaring his approval of the referee's report to determine that question, it will be treated as if it were now for the first time presented for his consideration.

If this executrix has any just claim to commissions, her title rests upon section 2736 of the Code of Civil Procedure, as amended by section 23, chapter 535 of the Laws of 1881.

The section, as thus amended, contains the following provision: "Where the value of the personal estate of the decedent amounts to one hundred thousand dollars or more over all his debts, each executor or administrator is entitled to the full compensation allowed by law to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled shall be apportioned among them according to the services rendered by them respectively." In the present case it is undisputed that the value of the testator's estate, in excess of his indebtedness, is far more than \$100,000. In the absence, therefore, of any contrary direction in the will, this executrix is entitled to such pro-

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In the Estate of John R. Marshall, deceased.

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portion of three full commissions as her services bear to the entire *quantum* of service rendered in the management of this estate. It is claimed, however, that by the terms of the will she is prohibited from receiving such commissions or any commissions whatever. I adhere to the views which I expressed in *Secor* agt. *Sentis* (5 *Redf.*, 570), and in *Matter of Gerard* (1 *Demarest*, 244), that a testator can effectually forbid the payment to his executors of any compensation for their services. It becomes necessary, therefore, to examine in the present case that article in the will which is claimed to deprive this executrix of rights that would be secured to her in the absence of such article by the provisions of the statute above quoted.

I. This is the language of the will: "It is my request that the persons herein named as executors will consent to act as such executors and trustees, and that each executor and trustee, *other than my wife*, do also take and receive the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them."

Now, what is the significance of the expression "other than my wife," as it is used in the foregoing sentence? Of course, the wife is shut out from *some* category in which the two other executors are included. But from what? The testator does not, it will be observed, expressly *give* the compensation indicated by his will, to all the executors except his wife. He "requests" that such executors other than his wife shall "receive and take" such compensation. Now, with what is the idea of exclusion, involved in the exception "other than my wife," here associated? Is it associated with the word "request" or with the words "receive and take?" This is an important inquiry; for while either construction would be sensible enough, only one of them could operate to deprive the executrix of the statutory compensation. Has the testator in effect said, "I request that all

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my executors except my wife *shall receive and take* full commissions, &c., &c., and I request that my wife *shall not receive and take* such commissions," or has he simply said, "I *request* that all the executors, except my wife, shall receive and take full commissions, but as to my wife I *do not make such request?*" For aught that is disclosed by the terms of the will itself, and I have nothing else to guide me to its correct interpretation, the somewhat unusual circumstance that this testator chose to supplement the clause appointing his executors with another, requesting them all to serve, and saw fit also to request the Messrs. Kernochan to "receive and take," as his executors, the commissions for which he made special provision in their behalf, may have been solely due to some apprehension on his part that without these strong intimations of his wishes, those gentleman might refuse to act, or might, if they should accept the trust, refuse to accept compensation. And his exclusion of his wife, therefore, from the class of those whom he thus *requested* to take and receive commissions may be fully explained either by his confidence that without injunctions from him she would be likely to demand her legal commissions, or by his indifference as to whether she laid claim to them or not.

Now, if there be two interpretations of this will, by one of which the executrix would, and by the other of which she would not, be shut out from receiving compensation, and if both interpretations are reasonable and consistent, I am bound to adopt the latter. For, by virtue of the statute, she has positive right to compensation unless by virtue of the will that right is taken away. And the will does not so operate unless its terms are necessarily in conflict with the terms of the statute.

II. A construction which would thus reconcile the provisions of the will with the right of the executrix to receive commissions seems to me to bear the test of still closer scrutiny and analysis.

Whatever may have been the testator's knowledge, or lack

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of knowledge, when he made the will, as to the extent of the compensation, which, in the absence of a special provision in that instrument, the law then in force would award to his executors, and whatever standard, concordant with that fixed by statute or variant from it, he may have supposed that he was establishing as regarded the two Messrs. Kernochan, the fact remains that the amount of commissions to which those executors would have been entitled under the law then in force, was in no respect either restricted or enlarged by the directions of the will. As regarded the rate of commissions upon estates whose value, above debts and liabilities, was not less than \$100,000, the law then in operation was section 8, chapter 362 of the act of 1863, which declared that where there were several executors their commissions should not be apportioned according to their services, but that each executor should be entitled to the commissions of a sole executor, unless the number of executors should exceed three, in which event they should each take an equal share of three full commissions.

What the testator says, therefore, is this and nothing more: the two Messrs. Kernochan shall each have as executor the same compensation that he could lawfully claim if remitted to his rights under existing laws. And yet in spite of the fact that the language of the will in this regard is quite free from ambiguity, I think it clear that the testator must have supposed that he was providing for the Messrs. Kernochan other and larger compensation than that established by statute. The last clause in the above quotation from the will seems inexplicable upon any other hypothesis. The testator there assigns his reason for giving the direction contained in the clause preceding. He declares that by that direction he has aimed to "*provide suitable compensation*" for the services of his executors. Now is it at all likely that the insertion in his will of a provision which, as we have seen, was utterly unnecessary and ineffective in point of fact, would have been accompanied by these words of explanation, *if such provision had been known to be unnecessary and ineffective by the testator*

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*himself*. It is much more reasonable to suppose that he may have been unacquainted with the statutory provision increasing the rate of executors' commissions, in cases where the estates committed to their charge equaled or exceeded \$100,000 in value, and may therefore have thought that unless he made special provision for larger compensation, the executors and executrix would be together entitled to no more than a single commission; and that he accordingly made use of the language now under interpretation with the mistaken belief that he was providing for each of the two Messrs. Kernochan, as "suitable compensation" for the services which he should thereafter render, three times the amount which those services, measured by the statutory standard, *as the testator understood it*, would entitle him to receive. It seems to me that the disputed article is not only fairly susceptible of this construction, but is hardly consistent with any other. It is difficult to believe that it was actually its exclusive *object*, as, upon any theory adverse to the claim of the executrix, it is unquestionably its exclusive *effect*, to deprive Mrs. Marshall of all commissions as executrix. If the words "other than my wife" constitute, and were meant to constitute the whole spirit and essence of the provision in dispute, the testator certainly took a very roundabout and intricate course for accomplishing a very simple and definite purpose. "My wife shall receive no commissions for acting as my executors" are words, for example, which would have effectually served his purpose, and would have utterly cut away the ground on which rests the present contention. These words of explanation furnish, therefore, a cogent argument in support of the claim that the exception regarding the wife, whatever may be its true import, was not the sole object, and probably not the principal object of the provision here in question. For it is a significant circumstance that those words of explanation have no bearing whatever upon the words "other than my wife," they relate exclusively to the clause respecting the Messrs. Kernochan, and their employment by the testator affords

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therefore strong indication that in his estimation that clause had some positive force and effect, and was accordingly worth explaining.

If this be the case, if the testator supposed that the provision for which he saw fit to assign a reason, entitled the Messrs. Kernochan, as executors, to a larger compensation than that established by law, it is clear that the words "other than my wife" contain no necessary implication, and, indeed, scarcely convey no special suggestion that for executorial service which the wife might thereafter render she should go wholly unrewarded.

For nobody would think of claiming that those words indicated a disposition on the testator's part to deprive his widow of whatever commissions the law might allow her, were it not for the fact that it is just such commissions as were grantable under the law in force when the will was executed, no more, no less, no other, that the testator expressly provides for the unexcepted persons.

Suppose that after naming A., B. and C., as his executors, he had provided compensation for "each of them except A." by any one of the following methods: (a.) By giving them a specified sum, whether just equaling the amount of statutory commissions or largely exceeding it, or falling far short of it, it matters not; and giving such sum without allusion to any provision of law applicable to the subject; or (b.) By giving such specified sum in lieu of statutory commissions; or (c.) By giving such specified sum in addition to statutory commissions; or (d.) By giving such compensation as would bear some specified ratio to the amount of statutory commissions, as, for instance, double the amount of such commissions or half the amount; in any of those cases, if indeed in any supposable case where the testamentary compensation expressly provided for B. and C. was not *by the very terms of its creation* precisely that which the law would have given them if the will had been silent, it is plain that despite the words of exception the right of A. to statutory commissions

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would be in nowise impaired. The exception would exclude A. from the enjoyment of the particular reward which the will bestowed on his fellow executors and from naught beside.

Now it seems to me that in the present case the words "other than my wife" must be construed precisely as it would have been necessary to construe them if the testator, by that article of the will wherein they appear, had *in fact provided*, as in my judgment he plainly *intended to provide*, and *supposed that he was providing* a special rate of compensation for the Messrs. Kernochan. If this be the true interpretation of the disputed article, then the rights of the executrix are precisely what they would have been if the will had said nothing whatever respecting the compensation of any of the persons to whose care the testator committed the posthumous estate. She is entitled to a portion of three full commissions—such portion to be ascertained, as has been already stated, by instituting a comparison between the value of services she has rendered in this administration, and the value of the whole service rendered up to the present time.

A reference will be necessary for taking testimony upon this question of fact, unless by agreement of the parties interested it shall become unnecessary.

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### N. Y. CITY COURT.

MORRIS SECKENDORF *et al.* agt. ANDRES W. KETCHAM *et al.*

*Attachment — Fraudulent disposition of property — Facts and circumstances to be considered as to fraudulent intent.*

On October 16, 1884, defendants claimed to be solvent, and to have a surplus of from \$10,000 to \$20,000. The following day they executed a bill of sale of their entire stock in trade, fixtures, &c., to one of their wives for a paid consideration of one dollar, and a past due debt of \$7,500. On the eighteenth of October they announced their suspension and insolvency to their creditors, a number of whom procured

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attachments. On the twentieth of October they made a general assignment:

*Held*, that although as an isolated fact the sale established no basis for an attachment, yet, in view of the circumstances, the transfer was not a *bona fide* one, and was made with no honest purpose, and the attachments must be sustained.

Also, *held*, that the fact that the sale was not consummated creates no difference in law.

*Special Term, October, 1884.*

MOTION to vacate an attachment.

*Hoes & Morgan (John H. Miller, of counsel)*, for motion.

*Nathan L. Hahn*, opposed.

HAWES, J. — The letters of the defendants addressed to their creditors, as well as all the admitted facts in the case, clearly demonstrate that they were presumably insolvent. This in itself, either as an admitted or concealed fact, would furnish no ground for an attachment, and is worthy of consideration only as an incident to the alleged fraud. The fraud charged is that the defendants, while in this insolvent condition, informed plaintiffs that they had made a bill of sale of their property on the day before to Mrs. E. W. Ketcham, the wife of one of the defendants, for the nominal consideration of one dollar, and that if their creditors brought suits against them they would not get a dollar, as Mrs. Ketcham would fight any and all law suits or claims against the property. This is denied by the defendants, but it is admitted by them that they did make a bill of sale of all their property to Mrs. Ketcham on the day alleged, but it is claimed that it was for a past due debt of \$7,500, and as this fact is not denied, it will be assumed to be true in the consideration of the motion.

A sale of property considered as an isolated fact establishes no basis for an attachment, but we are compelled to consider all the facts and circumstances which surround the transaction, and ascertain from them whether a fraudulent intent has been

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established. It may be said, by way of parenthesis, that a party may have had an innocent purpose in so far as the moral aspect of the case is concerned, and yet the law in considering the admitted facts will establish, as a legal consequence of their acts, a fraudulent intent in so far as creditors are concerned.

In other words, a legal fraud is not always a moral one, and I make this suggestion in view of the earnest and repeated assertion of the defendant that he intended to do no wrong. There must, of course, be an actual and not a constructive fraud established, but this arises when the acts done create as a logical sequence results that are not fairly or reasonably consistent with an honest purpose.

Now the fact is that defendant Ketcham, in his opposing affidavit, states that he is owing in merchandise debts over \$15,000, and he further swears that on the sixteenth of October, two days before this attachment was granted, he had in stock and book accounts enough to pay this \$15,000 and leave a balance of from ten to twenty thousand dollars, and yet in the face of these facts he transfers, or attempts to transfer, all of his stock to his wife for one dollar and a past due debt of \$7,500. The consideration is wholly inadequate to the amount of property transferred as stated by the defendant, and it cannot fairly or reasonably be deemed a *bona fide* sale, in view of the fact that the transfer was made at a time when the defendants were informing their creditors of their insolvency and suspension of payments and knew from the nature of things that their creditors would take immediate steps to enforce their claims.

A sale for a consideration of one dollar may be a valid sale as between the parties, but the circumstances which surround this case lead to the inevitable conclusion that this transfer was placing property beyond the reach of creditors, for however much he might primarily have intended it as a payment to Mrs. Ketcham, its inevitable effect was to place it beyond the reach of creditors and would in fact be a coercive measure

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to compel creditors to take less than the defendants could rightfully and legally pay and deprive them of their claims altogether. The fact that the sale was not consummated creates no difference in law, as is well settled by a long line of decisions.

In coming to the conclusion that this attachment should be sustained I have assumed that the defendant's version of the transaction was substantially correct, and upon his own version I am of the opinion that enough has been done by him to justify a denial of this motion.

I do not think it necessary to consider the plaintiff's version of the transaction, but if it is held to be correct a determination of this motion is very quickly reached.

Motion to vacate attachment denied, with costs.

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# DIGEST

CONTAINING THE WHOLE OF

67 *HOW.*, *ANTE*, AND *QUESTIONS OF PRACTICE* CONTAINED  
IN 31 AND 32 *HUN.*, AND 94 AND 95 *N. Y. REPORTS*.

Attention is called to the four additional headings "CODE OF PROCEDURE," "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE" and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

## ABANDONMENT.

1. *Certiorari* is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under section 899 of the Code of Criminal Procedure. (*The People ex rel. Sherrer* agt. *Walsh*, *ante*, 482.)
2. Such a proceeding is not a criminal action as defined in that Code, and the justice before whom it is brought sits as a magistrate and not as a court of special sessions. No appeal is given in such proceedings. (*Id.*)
3. On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him because she was in imminent danger of suffering personal violence at his hands, her case is made out, and it is therefore error on the part of the magistrate to exclude such testimony. (*Id.*)

## AFFIDAVIT.

1. The affidavit, required by the Code of Civil Procedure (sec. 1279)

to accompany the case on submission of a controversy upon admitted facts, must be made by one of the parties where there is a natural person a party by whom it may be made; an affidavit of an attorney of one of the parties is insufficient. (*Bloomfield* agt. *Ketcham*, 95 *N. Y.*, 657.)

## ALIMONY.

1. An order adjudging the defendant in contempt and directing his commitment for failure to pay alimony awarded by the judgment in a divorce action to the plaintiff, need not contain an adjudication that payment of the alimony could not be enforced by means of security or the sequestration of his property. (*Ryer* agt. *Ryer*, *ante*, 869.)
2. Though the court is authorized to relieve a party from further imprisonment, when it appears he is unable to comply with the direction contained in the judgment, yet when such inability arises from his having contracted a second marriage in defiance of the prohibition contained in the judgment recovered against him by the plaintiff, he is entitled to no favorable consideration. (*Id.*)

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## ANSWER.

1. Where a party would be privileged from testifying as a witness concerning the matters alleged, he need not verify his answer. He is privileged where the answer will have a tendency to accuse him of a crime or misdemeanor, or to expose him to a penalty or forfeiture. (*Frist et al. agt. Climm, ante, 214.*)
2. Conveying property in fraud of creditors furnishes an exceptional case by force of section 529. (*Id.*)
3. In an action by one domestic corporation against another domestic corporation the answer was as follows: "The defendant answering the complaint of the plaintiff, upon information and belief, alleges: First, that it admits that both plaintiff and defendant are domestic corporations; second, it denies each and every allegation in said complaint contained:"  
*Held*, that the answer was frivolous. It did not deny that it did not have knowledge or information sufficient to form a belief of either of the allegations contained in the complaint. Neither did it in direct terms deny either of such allegations. It was so substantially defective as to create no issue in the case. (*Pratt Manufacturing Co. agt. Jordan Iron and Chemical Co., ante, 230.*)
4. In an action against a corporation, an answer verified by its treasurer denying upon information and belief, each and every allegation of the complaint, except the allegation of the defendant's incorporation is in accordance with the present practice and creates a triable issue of fact, which must be disposed of by a trial in the regular way. (*Macaulay agt. The Bromell and Barkley Printing Company, ante, 252.*)
5. Where the complaint was upon a promissory note, and alleged that it was "made by defendant to his

own order for value, and was indorsed and delivered to one T., and that T. indorsed and delivered the same before maturity to D., as plaintiff is informed and verily believes, who thereafter and before maturity sold and delivered the same to plaintiff." And the answer was a denial that the defendant made, indorsed and delivered the note as alleged in the complaint to T. for value, and of any knowledge or information sufficient to form a belief of the allegations of the complaint that said T. before maturity or at any time indorsed and delivered the said note to D., or that D. sold and delivered the same to plaintiff:

*Held*, that the issues raised by the answer are material and the denials cannot be stricken out as sham. The frivolous character of the answer must be apparent without argument to make it frivolous. (*Deuel agt. Sandford, ante, 354.*)

6. A denial in an answer as follows: "Defendant denies each and every allegation, averment and statement of the complaint, except such as are hereinafter admitted, qualified and explained." is bad whenever the objection is raised by demurrer or special motion. (*Potter agt. Frail, ante, 445.*)
7. Where defendant in his answer denies "specifically each and every allegation of the complaint, except those hereinafter admitted, qualified or explained:"  
*Held*, that this form of denial is bad and the allegations of the complaint must be held to be admitted by the defendant. (*Callanan agt. Gilman, ante, 464.*)

## APPEAL.

1. Where there is conflicting evidence on a question of fact in the court below, this court will review the evidence and reverse the judgment appealed from, where it is clearly against the weight of evi-

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dence. (*Macniffe* agt. *Luddington*, ante, 18.)

2. Although the Code provides that an appeal must be taken from the order denying a new trial, an appeal taken before the judgment of reversal is entered is ineffectual to review the judgment. (*Vernon et al.* agt. *Palmer*, ante, 18.)

3. The common pleas in reviewing orders upon appeals from the city court like the court of appeals in reviewing orders on appeal from the superior city courts, decline to review the discretion exercised by the court below. Where the order involves a question of discretion in the court below it is, therefore, not appealable. (*Walsh* agt. *Schulz*, ante, 186.)

4. If an appeal be taken in such a case it will be dismissed. (*Id.*)

See UNDERTAKING.

*Dinkel* agt. *Wehle*, ante, 86.

5. The defendant, to stay all proceedings upon a judgment recovered against him, pending an appeal taken by him therefrom, gave an undertaking, with sureties, providing for the payment of all costs and damages which might be awarded against him on said appeal, not exceeding \$500, and that if the judgment appealed from, or any part thereof, should be affirmed, or the appeal be dismissed, he would pay "the sum recovered, or directed to be paid by the affirmance, or the part thereof as to which it is affirmed." Held, that the undertaking was insufficient as it failed to comply with the requirements of section 1327 of the Code of Civil Procedure; that it should have provided that in case the judgment appealed from, or any part thereof, was affirmed or the appeal dismissed, he, the appellant, would pay "the sum recovered or directed to be paid by the judgment or order, or the part thereof

as to which it was affirmed." (*Hollister* agt. *McNeill*, 31 Hun, 629.)

6. Undertaking, execution of, by one surety upon the condition that another shall be procured — when such surety may set up a breach of the condition as a defense to an action upon it. (See *Grimwood* agt. *Wilson*, 31 Hun, 215.)

7. Election of remedies — once made is irrevocable — when the issuing of an execution upon a judgment, pending an appeal, is a waiver of all right to resort to an undertaking given thereon. (See *Collins* agt. *Ball*, 31 Hun, 187.)

8. Motion — a decision of one justice cannot be reviewed at a special term held by another — Code of Civil Procedure, section 1002. (See *Tunstall* agt. *Winston*, 31 Hun, 225.)

9. Justices' court — entry of a judgment for too large an amount — power of the successful party to remit a part of it — costs of an appeal to the county court. (See *Allen* agt. *Shoan*, 32 Hun, 363.)

10. Highway — encroachment upon it — certificate of a jury summoned under section 105 of 1 Revised Statutes, 522 — question as to whether an appeal lies therefrom to the county court — Code of Civil Procedure, section 3041. (See *Commissioners of Jamaica* agt. *Van Allen*, 32 Hun, 61.)

11. Appeal — does not lie from an order sustaining a demurrer — when the facts stated in a complaint constitute but a single cause of action. (See *Welch* agt. *Platt*, 32 Hun, 194.)

12. Bond given by a deputy to the sheriff — the deputy is not liable for the costs of an unsuccessful appeal, taken by the sheriff without the deputy's consent. (See *Conners* agt. *Keese*, 32 Hun, 98.)

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13. Award — appeal from an order confirming the report of arbitrators, or from the judgment entered thereon — upon what papers it must be heard — no case can be proposed or served. (*See Matter of Poole* agt. *Johnson*, 32 *Hun*, 215.)
14. What errors can be corrected upon an appeal from a decree of the surrogate on the final settlement of an executor's accounts, without any case being prepared and settled — Code of Civil Procedure, section 998. (*See Matter of Jackson*, 32 *Hun*, 200.)
15. Decision of an issue of fact by a surrogate — he must file findings of fact and conclusions of law — Code of Civil Procedure, section 2545 — what papers must be presented to the general term on an appeal from his decision. (*See Waldo* agt. *Waldo*, 32 *Hun*, 251.)
16. By a town to the board of state assessors — 1880, chapter 84 — power of the board of supervisors to audit the costs and expenses incurred on the appeal — an audit once made cannot be revoked. (*See People ex rel. Burhans* agt. *Supervisors*, 32 *Hun*, 607.)
17. Laying out a private road — appeal from the decision of the commissioner of highways — presumption in favor of regularity — upon the hearing of a *certiorari* the record only can be considered — power of the referees appointed by the county judge on such an appeal to consider the damages of the landowner. (*See People ex rel. Cashman* agt. *Heddon*, 32 *Hun*, 299.)
18. The general term of the supreme court has no authority on appeal to determine the amount of unsettled damages; at least where no facts are found below upon which an estimate as to the true amount can be made. (*Andrews* agt. *Tyng*, 94 *N. Y.*, 16.)
19. In an equity action brought to set aside alleged fraudulent conveyances made by a judgment debtor, the defendant is not entitled to a jury trial. The court may frame issues and direct them to be tried before a jury, but this is in its discretion, and its determination is not the subject of review. (*Wright* agt. *Nostrand*, 94 *N. Y.*, 81.)
20. On trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had been greatly injured in his business by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. The questions were objected to generally: *Held*, defendant could not object on appeal that the complaint was not specific enough to authorize proof of special damage. (*Bergmann* agt. *Jones*, 94 *N. Y.*, 51.)
21. An order of general term affirming an interlocutory judgment is not appealable. (*Raynor* agt. *Raynor*, 94 *N. Y.*, 248.)
22. An order of general term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners, is not reviewable here. (*In re N. Y. W. S. & B. R. Co.*, 94 *N. Y.*, 287.)
23. The general term, however, has no power on appeal by the company from the order of confirmation to award costs against the owners. (*Id.*)
24. Where costs are awarded, so

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- much of the general term order is reviewable here; but this does not confer jurisdiction to review the whole order. (*Id.*)
25. An appellant is simply bound to present his case to the general term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case but disallowed by the trial judge. (*Kilmer* agt. *N. Y. C. & H. R. R. R.*, 94 *N. Y.*, 495.)
26. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot, therefore, be properly referred to to ascertain the grounds of decision. (*Scott* agt. *Morgan*, 94 *N. Y.*, 508.)
27. After trial of an action on contract, and after the decision of the court, but before judgment, an order of arrest was issued and served; it was granted on affidavits establishing fraud *prima facie*: *Held*, that the order was in time; and that although the averments in said affidavits were denied by defendant's opposing affidavits, the questions of fact were for the court below to pass upon, and its determination was not reviewable here. (*Humphrey* agt. *Hayes*, 94 *N. Y.*, 594.)
28. Where a judgment entered upon the report of a referee is reversed by the general term, upon questions of fact, in reviewing its decision here the decision of the referee will be upheld, unless it appears to be manifestly against or contrary to evidence. If it appear, upon examination of the whole evidence presented by the record, that it has force sufficient to uphold the findings of the referee, or if the evidence is so balanced, it can be seen that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale, it may be assumed that there were circumstances of the kind proper for the consideration of the referee, and that they affected his determination, and in such case his conclusions will be sustained. (*Sherwood* agt. *Hauser*, 94 *N. Y.*, 626.)
29. When order improperly granted allowing receiver of a firm to come in and defend an action against members of firm and when reviewable here. (*See Honegger* agt. *Wettstein*, 94 *N. Y.*, 252.)
30. Costs of unsuccessful appeal by testamentary trustee from decree of surrogate in proceedings to compel him to account, may be imposed upon him individually. (*See In re McCarter*, 94 *N. Y.*, 558.)
31. General objection to evidence not available on appeal save where the objection could not have been obviated had it been specified. (*See Colleran* agt. *Kennedy*, 94 *N. Y.* [*Mem.*], 634.)
32. Judgment in action to vacate assessment, where assessment is less than \$500 not reviewable here. (*See Rogers* agt. *Village of Sandy Hill*, 94 *N. Y.* [*Mem.*], 638.)
33. Where on appeal from order of general term denying motion to dismiss appeal it does not appear that the order is not one in discretion of that court it is not reviewable here. (*See McKenna* agt. *Bolger*, 94 *N. Y.* [*Mem.*], 641.)
34. Where, upon appeal from a surrogate's decree settling the accounts of executors, the account is not reopened, but is sent back to be readjusted as to certain items, the decree is conclusive as to all of the questions passed upon, and not so referred back for re-examination or correction, and they may not be litigated upon the second hearing. (*Adair* agt. *Brimmer*, 95 *N. Y.*, 85.)

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85. Where in an action to foreclose a mortgage the court directs any matter of fact to be tried by a jury as authorized by the Code of Civil Procedure (*secs.* 823, 971, 1003), and where after such trial the court disregards the verdict and makes its own findings, the case is to be reviewed on appeal, on the findings and decisions of the court, as if there had been no submission of any fact to the jury. (*Carroll* agt. *Deimel*, 95 N. Y., 252.)

86. On appeal to this court from a judgment of general term affirming a surrogate's decree, the evidence may be looked into only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the surrogate; if such evidence is found, the court is concluded by the findings. (*In re Cottrell*, 95 N. Y., 329.)

87. Under the provision of the Code of Civil Procedure (*sec.* 2545), declaring that no decree or order of a surrogate shall be reversed for error in admitting or rejecting evidence "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," when incompetent evidence has been received, or competent evidence rejected, and it appears that the evidence was important and material, and the court of review cannot say that, notwithstanding the error, the judgment is right, or, if it entertain a reasonable doubt, a case is presented where the party excepting was "necessarily prejudiced," and the error requires a reversal of the judgment. (*In re Smith*, 95 N. Y., 516).

88. Where a notice of appeal from a final judgment does not specify and gives no notice of an intention to review an interlocutory judgment, the latter, as to all points covered thereby, is to be taken as the settled law of the case, and is not open for review upon the ap-

peal (*Code of Civil Procedure, secs.* 1301, 1316). (*Reese* agt. *Smyth*, 95 N. Y., 645.)

89. An order of general term granting a new trial in a case tried by a jury is not appealable to this court, where a material and controverted question of fact was involved, upon which the general term might have granted the new trial; and although both parties desire it, such an appeal will not be entertained. (*Bronk* agt. *N. Y. and N. H. R. R. Co.*, 95 N. Y., 656.)

40. An application for an order dispensing with or limiting the security required to stay execution on appeal to this court may not be made here, but should be made to the court "in or from which the appeal is taken" (*Code of Civil Procedure, sec.* 1312). (*Hills* agt. *Peekskill Savings Bank*, 95 N. Y., 675.)

41. A question not presented by the case on appeal may not be raised by affidavit. (*See Reese* agt. *Smith* [*Mem.*], 95 N. Y., 649.)

42. Order of general term denying motion for an order requiring receiver of an insolvent corporation to refund assessment upon stock paid by a stockholder, which assessment was thereafter adjudged to be illegal, when not appealable to this court. (*See In re Ensign* [*Mem.*], 95 N. Y., 664.)

## APPORTIONMENT OF RENT.

1. The city leased to the defendants, for wharfage purposes, the south side of pier No. 51, North river, for a term of years, ending in 1875, the rent payable quarterly, on the first days of August, November, February and May. There was a proviso in the lease that the lessors might at any time "set apart for their use any or all of such wharves as they may require," the right to

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the part of the premises so required to vest in the city for all purposes, on notice being given to the lessees by the comptroller, the rent thereafter to be equitably reduced proportionate to the part of the premises not taken. On the 9th of October, 1873, notice was served requiring the whole of the premises, and the city took possession. In this action to recover the proportionate amount of rent accruing between August first and October ninth:

*Held*, that there can be no recovery, because, in the absence of a statute, or an express agreement to that effect, rent cannot be apportioned in respect to time. The act of 1875, providing for an apportionment of rents, has no application to leases executed before that date. (*The Mayor, &c.*, agt. *Ketchum et al.*, ante, 161.)

## ARBITRATION.

1. During the pendency of this action the parties thereto signed a written agreement by which they agreed to leave all their differences to three arbitrators therein named, and that their decision should be final. The agreement was not acknowledged but was signed by the parties and three witnesses: *Held*, that the agreement, operated as a discontinuance of the action, and that the fact that one of the arbitrators refused to act and that one of the parties refused to appear before the arbitrators, did not prevent it from having that effect. (*McNulty* agt. *Solley*, 31 *Hun*, 17.)

## ARREST.

1. Where, in an action in a district court upon contract, an order of arrest has been granted upon facts (shown by affidavits) extrinsic to the cause of action, and such order of arrest has not been vacated, the

plaintiff need only prove on the trial his money demand, and is then entitled to a judgment subjecting the defendant to execution against his person. (*Stern* agt. *Moss*, ante, 169.)

2. In an action upon contract the imperative requirement is, that it must be alleged in the complaint that the defendant was guilty of fraud. (*Straus* agt. *Kreis*, ante, 275.)
3. Where there is no complaint presented with the motion for the arrest, and the affidavits do not aver what the allegations of the complaint were, the order of arrest will be vacated. (*Id.*)
4. In the cases where, under the Code of Civil Procedure (*sec.* 550), the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial. (*Segelken* agt. *Meyer*, 61 *N. Y.*, 473.)
5. As the act of 1879 (*chap.* 542, *Laws of 1879*), amending the provisions of the Code of Civil Procedure (*sec.* 549) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (*sec.* 2), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial. (*Humphrey* agt. *Hayes*, 94 *N. Y.*, 594.)

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6. After trial of an action on contract and after the decision of the court, but before judgment, an order of arrest was issued and served; it was granted on affidavits establishing fraud *prima facie*: *Held*, that the order was in time; and that although the averments in said affidavits were denied by defendant's opposing affidavits, the questions of fact were for the court below to pass upon, and its determination was not reviewable here. (*Id.*)

## ASSAULT AND BATTERY.

1. A warrant of commitment reciting a conviction for the crime of assault and battery and a sentence to imprisonment thereon is valid. (*People* agt. *Gray*, ante, 456.)

## ASSESSMENT AND TAXATION.

1. If the ordinance for the pavement of a street is passed without authority of law, the execution of the work can be prevented by appropriate application to the court. A party not having availed himself of his legal rights in that respect is precluded by section 903 of the Consolidation Act from asking to have the assessment vacated. (*Matter of Smith*, ante, 501.)

2. Where there is nothing by which the court can determine the extent to which an assessment has been increased by reason of fraud or substantial error, under section 903 of the Consolidation Act it can neither vacate nor reduce an assessment. (*Id.*)

## ASSIGNMENT.

1. When a debtor, in failing circumstances, has made an assignment of his estate for the payment of his debts, his creditors may come in under the assignment and insist

that the assignee shall, with fidelity, execute the trust in pursuance of the instrument. Or the creditors may stand aloof, refusing to recognize the validity of the instrument on the ground of actual fraud or other illegality, and they may institute appropriate proceedings at law or in equity to test the validity of the assignment in the courts. (*Cavanagh* agt. *Morrow*, ante, 241.)

2. Creditors have an election as to which course they will adopt. They cannot pursue both. Creditors cannot in one moment take steps in recognition of the assignment, and in the line of its strict enforcement, according to its terms, and seek to hold the assignee to its performance, and in the next repudiate it as fraudulent and void. (*Id.*)

3. An election may be implied from the facts and circumstances of the case, and when an election is made it is irrevocable. Creditors may express their election to come in under an assignment in several ways: "by giving notice to the assignee of the acceptance of it," and less formally by simply presenting their claims to the assignee for payment or dividend. By coming in under a voluntary assignment, creditors express their election to accept of its provisions, and are considered as acquiescing in the disposition made. (*Id.*)

4. The act of a creditor in verifying his claim and presenting it to an assignee is a recognition of the lawfulness of his title to the assignee's estate, and of his right to administer the same, in payment of the debts of the assignor, as provided for in the instrument. And when a creditor, having verified his claim and presented it, goes further and becomes a party to a proceeding for an accounting by the assignee, under the statute, and exercises the right to scrutinize the accounts and to inter-

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- pose objections to payments and disbursements made by the assignee, he should be held to have acquiesced in the fact of the assignment by the debtor for the benefit of creditors, and the legality of such assignment, so as to be estopped from claiming that it was fraudulent in its inception. (*Id.*)
5. In a general assignment by a partnership a preference of an individual creditor of one partner invalidates the whole deed; at least, when alterations in the books of the firm clearly indicate a fraudulent intent. (*Windmuller agt. Dodge & Sinclair, ante, 253.*)
6. An unliquidated claim for damages is not provable against an assigned estate in the hands of assignee. (*In the Matter of the Assignment of Henry Adams, etc., ante, 281.*)
7. Insolvent proceedings extend only to such debts as were due at the time of the assignment. Such debts must be specific and certain sums of money to which the creditor can make oath as being justly due or to become due at some specific time; and unless the creditor, at the time of the assignment, be able to produce and verify such debt, he will not be entitled to receive from the assignees his dividend of the insolvent effects, nor will he be barred from his future action against the insolvent. (*Id.*)
8. An assignment for the benefit of creditors is not valid, if not duly acknowledged and recorded. (*Smith agt. Boyle, ante, 351.*)
9. The certificate of acknowledgment of an assignment for the benefit of creditors read: "On this (giving the date) before me personally appeared A. and B., to me personally known to be the individuals described in and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned:"
- Held*, that the assignment was invalid because not duly acknowledged and recorded, because the certificate does not set forth that the officer knew the persons acknowledging to be the persons described in and who executed the conveyance. The irregularity in the certificate cannot be cured, so as to give the assignee title or right over the attaching creditors. (*Id.*)
10. The books of a firm are competent and proper evidence to determine the amount of a claim in favor of one partner against the other, so as to entitle the claimant to share in the dividends of an assigned estate even though the objections to the claim are made by a creditor of the assignor having no relations to the firm and being a stranger to the transactions set forth in the books. (*Matter of the Objections filed by Woodward and Worthington, ante, 359.*)
11. Proof of debt in the bankruptcy of the assignor, without disclosing the lien under the assignment, does not waive the creditor's right to the dividend. (*Id.*)
12. *Ansonia Brass and Copper Co. agt. Babbitt* (74 N. Y., 395), distinguished, and sections 5075 and 5105 of the United States Revised Statutes construed. (*Id.*)
13. In any event, to entitle a creditor to claim a waiver by his co-creditor to a dividend out of the assigned estate, by reason of the latter's proof of debt in bankruptcy, it must affirmatively appear that the proving creditor had knowledge of his lien under the assignment. (*Id.*)
14. A referee appointed to pass the assignee's accounts, and to hear and determine the issues raised by objections to certain claims, has the power to extend the time in

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which other claims may be filed, so as to entitle them to a distributive share in the assets. (*Id.*)

15. An insolvent assignment reserving to the assignor power of revocation, is void in judgment of law. (*Reichenbach* agt. *Winkhaus et al.*, ante, 512.)

16. Any purpose of the assignor which would render the assignment legally fraudulent if contained in the deed, is equally effective if shown by other proof. (*Id.*)

17. The deposit of the assignment with a stranger, after complete execution, to hold until receipt of further orders from the assignor, or to file when, in the judgment of the depositary, it should be for the best interests of all creditors, is a clear reservation of the power to revoke, rendering it void. (*Id.*)

## ATTACHMENT.

1. Where the grounds of the allowance of an attachment was that the defendant was disposing of, or was about to assign and dispose of his property with intent to defraud his creditors, and those grounds were sought to be supported by threats alleged to have been made by defendant, that if sued he would make a preferential assignment of his property, in which case those prosecuting him would get nothing on their claims. In connection with such threats his insolvency was stated with an offer to the plaintiff to compromise at fifteen per cent:

*Held*, that the attachment was improperly granted. The facts stated are insufficient to charge a debtor with an intent to defraud his creditors (*The case of Anthony* agt. *Stype*, 19 *Hun*, 268, explained). (*Farwell et al.* agt. *Furniss*, ante, 188.)

2. An attachment issued against a firm doing business in Chicago, Ill.; one of the partners had his domicile in this state, but a part of each year he resided in Chicago: *Held*, proper. (*McKinlay* agt. *Fowler*, ante, 388.)

3. The place of business of a firm at which its operations are carried on, and where the partners are either continually or at times to manage the business, can properly be called the residence of each of the partners within section 636 of the Code of Civil Procedure. (*Id.*)

4. An attachment against a non-resident will not be vacated on proof that the property attached belongs to a third person. (*Id.*)

5. Where shortly before an assignment by a firm for the benefit of creditors individual members of the said firm made drafts of moneys belonging to it much larger than they had been in the habit of making at any one time or during any one month, not for the purpose of meeting obligations of the firm, or even for the payment of individual debts, such drafts are a fraud upon creditors justifying the issuance of attachment against the firm's property; and though the property thus taken be afterwards returned, the attachment should not for that reason be discharged. (*Globe Woolen Company* agt. *Carhart et al.*, ante, 403.)

6. A bond, promissory note or other instrument for the payment of money can be attached only by taking the same into the sheriff's actual custody. (*Anthony* agt. *Wood*, ante, 424.)

7. Leaving a certified copy of the warrant with the usual notice upon a person having in his custody a bond belonging to the defendant in attachment is ineffectual to attach such bond. (*Id.*)

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8. A delivery of the bond claimed to be attached does not relate back to the time of the service of the warrant so as to vest title in the sheriff from that date. Neither the obligor in the bond nor the sheriff can set up the fraudulent character of the transfer of such bond to an assignee in an action thereon. (*Id.*)
9. The Code of Civil Procedure (*sec.* 649, *sub.* 2) has made no change by which bonds, promissory notes, &c., are subjected to the rules governing the attachment of goods and chattels, except as to the manner in which the attachment is effected (*Thurber agt. Blanck*, 50 *N. Y.*, 80; and *Castle agt. Lewis*, 78 *N. Y.*, 187, *followed and approved*; *Anthony agt. Wood*, 20 *Hun*, 289, *reversed*). (*Id.*)
10. Where the affidavits upon which attachments were granted failed to show affirmatively that the debts upon which the suits were brought, and for which the attachments were issued, were due at the time of the commencement of the suits and of the issuing of the attachments, but it appeared that the general terms of the sale of goods by plaintiffs to customers were "five per cent off, cash in thirty days, or two per cent by customers giving their note at four months in settlement of the bills," and the notes had not been given by defendants:  
*Held*, that the failure to pay cash in thirty days would not have the effect to make the debts due at that time, but would operate as an election on the part of the buyers to take the credit of four months, and mere neglect to give the notes, without refusal of application for them, would not give the right to immediate action. (*Victor et al. agt. Henlein et al.*, *ante*, 486.)
11. A memorandum, as part of the bills of sale showing that the sales were at four months, should control on the question of terms instead of the usage of plaintiffs or entries in their books of sale. (*Id.*)
12. Where it was claimed that debts for goods sold on credit had become presently due because the sales were procured on fraudulent representations, and the only representations alleged were those made to sellers by mercantile agencies of statements made to these agencies by defendants as to their condition generally:  
*Held*, that it must be clearly shown that the accused buyer made these statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other seller. (*Id.*)
13. The payment shortly before an assignment for the benefit of creditors, and in contemplation of it, of a debt to a former partner, if actual and honest would be no fraud *per se*, nor would the drawing out by defendants, respectively, considerable sums of money from the firm before the assignment and in contemplation of it, if done under a mistake as to their rights and not with intent to defraud creditors, or with a design to conceal property with the purpose of defrauding them, be such a fraudulent disposition of property as to entitle a simple creditor to attachment under the provisions of the Code. (*Id.*)
14. Where it appears by the papers that the claim sued on was fraudulently contracted, the whole debt becomes due by operation of law, and it is error in such a case to vacate an attachment because the term of credit had not expired. (*Muser agt. Lisner*, *ante*, 509.)
15. On October 16, 1884, defendants claimed to be solvent, and to have a surplus of from \$10,000 to \$20,000. The following day they executed a bill of sale of their entire stock in trade, fixtures, &c., to one of

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their wives for a paid consideration of one dollar, and a past due debt of \$7,500. On the eighteenth of October they announced their suspension and insolvency to their creditors, a number of whom procured attachments. On the twentieth of October they made a general assignment:

*Held*, that although as an isolated fact the sale established no basis for an attachment, yet, in view of the circumstances, the transfer was not a *bona fide* one, and was made with no honest purpose, and the attachment must be sustained.

Also, *held*, that the fact that the sale was not consummated creates no difference in law. (*Seckendorf et al. agt. Ketcham et al.*, ante 526.)

16. The fees and expenses of the sheriff upon an attachment issued in this action were partially settled by an order made by the court on November 15, 1882, and finally settled by a second order made by the court on June 1, 1883, prior to which time the attachment had been discharged by the voluntary action of the plaintiffs. By these orders the plaintiffs were ordered and directed to pay the amount so allowed to the sheriff, and he was thereupon directed to release and deliver the property attached to the defendant. No appeal was taken from either of these orders. Subsequently the plaintiffs moved to amend the orders by striking out so much thereof as required the plaintiffs to pay the amount of the said fees to the sheriff: *Held*, that under section 3307 of the Code of Civil Procedure, the judge had no power to do more than adjust the fees, compensation and expenses of the sheriff, and that he could not inquire or determine as to the liability of the parties for the payment of the amount so adjusted. (*Hall agt. U. S. Re-lector Co.*, 31 Hun, 609.)

17. That as there was no authority for the insertion in the order of

the directions for the payment of the fees, &c., by the plaintiffs, they could move to have it stricken therefrom although no appeal had been taken. (*Id.*)

18. That the orders were inoperative for the further reason that they were made by the court and not by the judge issuing the warrant, as required by the Code of Civil Procedure. (*Id.*)

19. A motion lies to vacate an attachment which has become inoperative by reason of the failure of the plaintiff to serve the summons within thirty days from the time of the issuing and service of the attachment. (*Betzeman agt. Brooks*, 31 Hun, 271.)

20. Upon the hearing of a motion to vacate a warrant of attachment, issued upon the sole ground of the non-residence of the defendant, the latter presented affidavits showing that he was a resident of the state. The plaintiff then read affidavits tending to show, among other things, that prior to the time of issuing the warrant the defendant had disposed of his property with intent to defraud his creditors, and had kept himself concealed with the like intent, and with the intent to avoid the service of process. The court made an order allowing the attachment to be amended, by inserting therein as grounds for its issue the said fraudulent acts, upon payment of costs, and denied the motion to vacate, without prejudice to a renewal thereof: *Held*, that the power of amendment conferred upon the court, by section 723 of the Code of Civil Procedure, was broad enough to cover this case, and that the restriction upon the right of the plaintiff to oppose a motion to vacate by new proof, imposed by section 683 thereof, related not to the power of the court to allow amendments, but only to the practice to be pursued

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upon a motion to vacate. (*Kibbe* agt. *Welmore*, 81 *Hun*, 424.)

21. That although the defendant might, under the provision of the said section 683, have objected to the reading of so much of the plaintiff's affidavits as tended to show grounds for sustaining the warrant, other than that stated therein, yet by his failure so to do the objection was waived, and could not thereafter be raised on appeal. (*Id.*)

22. The affidavits tended to show that the fraudulent disposition of property was made in Pennsylvania, and not in this state: *Held*, that this did not deprive the court of the power to grant an attachment; that it was immaterial where the fraudulent disposition took place so long as the court in this state had jurisdiction of the parties and the action. (*Id.*)

23. On November 5, 1883, the plaintiff applied for an attachment against the property of the defendant upon the ground that he was a non-resident. The affidavit made on that day, stated that the defendant was indebted to the plaintiff in the sum of \$6,000, over and above all counter-claims known to the plaintiff, for damages for the breach of a contract, and that the indebtedness arose upon the following facts: That "at sundry times since April 1, 1883, and up to and including this date, the said plaintiff, at the special instance and request of the said defendant, loaned and advanced to the said defendant, in cash, sundry sums and amounts of money, amounting in the whole to the said sum of \$6,000, and which he agreed to repay to the plaintiff, and no part of which has at any time been repaid, and which the defendant has neglected to repay to the plaintiff, and still so neglects:" *Held*, that the affidavit failed to show any cause of action existing in favor of the

plaintiff, as it did not appear, expressly or by necessary implication, that all or any of the money so loaned was due and payable at the time the attachment was issued. (*Reilly* agts *Sisson*, 81 *Hun*, 572.)

24. The plaintiff obtained an attachment against the property of the defendants, as non-residents, upon an affidavit stating that the defendants were indebted to him, in a sum named, for work, labor and services done and performed by him for them at their request, the reasonable worth of which they had promised to pay; that such work and services were reasonably worth the sum of \$20,000; that no part of it had been paid, and that the said sum was still due and owing from the defendants to the plaintiff, over and above all counter-claims. It was then stated that the said work, labor and services were performed during a period extending from September 1, 1882, down to the time of the commencement of the action: *Held*, that as the action was commenced on the very day the services were completed, and as the defendants were entitled to the whole of that day to pay for them, and as no demand and refusal to pay was alleged, no cause of action was shown and the attachment was properly dissolved. (*Smadbeck* agt. *Sisson*, 81 *Hun*, 582.)

25. An affidavit upon which a warrant of attachment was issued contained the usual formal allegations, and stated as the cause of action that the defendants were copartners and commission merchants in the city of Chicago; that on or about May 12, 1883, they purchased for the plaintiff 250 barrels of pork at seventeen dollars and ninety-two and one-half cents per barrel at a commission of two and one-half cents for purchasing, which was paid by the plaintiff; that the defendants

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were to sell the same, if requested so to do by the plaintiff, at any time during the year 1883, and not otherwise; that on or about June 18, 1883, the defendants, without the knowledge, consent or request of the plaintiff, sold said pork at the price of fifteen dollars twenty-seven and one-half cents per barrel, and reported to plaintiff that it had been sold and delivered to other parties. It then stated that it was sold for less than its cost and claimed to recover the difference: *Held*, that the attachment was properly vacated as the affidavit failed to show a right to recover more than nominal damages. A bare statement in the affidavit of the amount claimed is not enough, the facts showing the right to recover must be set forth. It is not the intent of the statute to allow the property of a defendant to be attached upon a claim for nominal damages only. (*Walts* agt. *Nichols*, 32 *Hun*, 276.)

26. It was claimed on the appeal that the particulars in which the attachment papers were defective should have been specified in the notice of motion to vacate it, and that the moving papers should have been entitled as to the defendant, "George E. Nichols, impleaded, etc.," instead of "George E. Nichols:" *Held*, that as the first defect objected to related to the merits, and was not a mere irregularity, it was not necessary to specify it in the notice of the motion to vacate the attachment. That a defect in the title of the action cannot be taken advantage of on appeal if an objection thereto was not taken below. (*Id.*)

27. Where an attachment is issued in an action against partners, either defendant may move, alone, to have the attachment wholly vacated in so far as it affects firm property. (*Id.*)

28. An action brought, under section 8247 of the Code of Civil Pro-

cedure, to recover the costs of a former action which was prosecuted by the present defendant in the name of a third person, for the defendant's benefit, is not an action upon a contract "express or implied," within the meaning of section 685 of the said Code providing for the cases in which an attachment may issue. (*Remington* agt. *O'Dougherty*, 33 *Hun*, 255.)

29. To authorize the issue of an attachment against a defendant for refusing to comply with the directions, for the payment of alimony, contained in a judgment recovered against him, it must be shown that a certified copy of the judgment has been served upon him and that a specific demand has been made for the amount alleged to be due. (*Ryckman* agt. *Ryckman*, 82 *Hun*, 193.)

30. Under an attachment procured by the plaintiff, in an action brought by him against one Kennedy, a deputy of the defendant, a sheriff levied upon a stock of goods belonging to Kennedy, which were in a small store kept by him. The next day a constable broke open the door of the store, of which the sheriff had the key, levied upon the goods and commenced to remove them. The deputy appeared, notified the constable that the goods had been attached, and forbade him to remove or interfere with them. The constable, assisted by several other persons, continued to remove them and overpowered the deputy, who used all possible efforts to retain possession of them, and commanded the bystanders to assist him. Subsequently the sheriff brought an action against the constable for interfering with his possession and recovered a verdict for the value of the goods. In this action brought by the plaintiff, who had recovered a judgment in the action in which the attachment was granted, and issued an execution thereon which

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had been returned unsatisfied, to recover the damages occasioned by the failure of the sheriff to keep and sell the property attached: *Held*, that the plaintiff was entitled to recover. That even if the sheriff had done all in his power to care for and protect the property up to the time at which the constable succeeded in wrongfully removing it, yet he was guilty of a neglect of his duty thereafter in failing to retake it by force or bring an action of replevin for its recovery. (*Wood agt. Bodine*, 32 Hun, 354.)

31. Where, under a warrant of attachment in an action, a demand due to the defendant from a third person has been attached, it is the right and the duty of the sheriff to forthwith bring an action to collect the said demand, without waiting for the determination of the action in which the attachment was issued, or for any order or direction from the court or judge. (*Davidson agt. Utham National Bank*, 32 Hun, 138.)

## ATTORNEY AND CLIENT.

1. In this action, brought to recover the value of services rendered to the defendant the latter, after the joinder of issue, paid the plaintiff in full and procured an order at a special term discontinuing the action and striking it from the calendar. The plaintiff's attorney, in his own interest, opposed the motion and appealed from the order: *Held*, that as there was no evidence to show that the settlement was collusive or made with intent to defraud the attorney, the order was properly made and should be affirmed. (*Roberts agt. Doty*, 81 Hun, 128.)
2. Action—in the absence of fraud and collusion it may be settled by the parties without the consent of their attorneys. (*See Root agt. Vanduzen*, 32 Hun, 63.)

3. An action against a corporation is abated by its dissolution, its attorneys have no power thereafter to act for it. (*See Matter of Norwood*, 32 Hun, 196.)

4. Right of one appearing as a witness before a committee of the senate of the state of New York, to have the advice of counsel. (*See People ex rel. McDonald agt. Keeler*, 32 Hun, 563.)

5. Plaintiffs agreed to prosecute two actions for defendant for a specified sum as retaining fee, an allowance for each day's attendance before a referee, and a per centage of any recoveries. Because of non-payment of the retaining fee, and the daily allowance, plaintiffs, as the referee found, "refused to be bound by the contract," but they continued thereafter as attorneys of record and acted in that relation, and as such, without the knowledge of their client and in hostility to his interests stipulated to vacate an order in his favor, granted in one of said actions: *Held*, that plaintiffs' contract was an entire one; that conceding because of the non-payment of fees they might refuse to act, they could waive the default, and having so done, by acting as attorneys thereafter, and their action being wrongful and adverse to their client, they were not entitled to compensation for any services in said suit. (*Andrews agt. Tyng*, 94 N. Y., 16.)

6. Before plaintiffs' refusal to be bound a judgment against defendant had been rendered in the other of said actions: *Held*, that plaintiffs could only recover under and according to the terms of the contract. (*Id.*)

7. *It seems*, that the issuing of an execution against the person of a judgment debtor is within the scope of the implied authority of the attorney for the judgment creditor; and when such an exe-

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cution is issued and the debtor arrested thereon in a case where it is not authorized, the client may be held liable, although there be no evidence that he directed either the issuing of the execution or the arrest. (*Guilleaume* agt. *Rowe*, 94 N. Y., 268.)

8. The affidavit required by the Code of Civil Procedure (*sec.* 1279) to accompany the case on submission of a controversy upon admitted facts, must be made by one of the parties where there is a natural person a party by whom it may be made; an affidavit of an attorney of one of the parties is insufficient. (*Bloomfield* agt. *Ketcham*, 95 N. Y., 657.)

## ATTORNEY'S LIEN.

1. From the commencement of an action the attorney has a lien upon his client's cause of action, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they come, and cannot be affected by any settlement between the parties before or after judgment. (*Smith* agt. *Baum*, *ante*, 267.)
2. A settlement, after issue joined, had between the parties, although conclusive as to them, in no way affects the attorney, who may proceed in the action as if no settlement had been made. (*Id.*)
8. But the lien cannot be enforced upon a mere motion to compel the defendant to pay the plaintiff's attorney his taxable costs by awarding a judgment therefor. (*Id.*)
4. An application by "plaintiff's attorney" for an order directing the defendant to pay "his costs and counsel fee," or that he have judgment therefor, is not warranted by the practice. (*Id.*)

## BAIL.

1. Where the bail apply to be exonerated on account of the death of their principal, the application must be made before their time for answering expires. (*Walsh* agt. *Schule*, *ante*, 178.)

2. The relator was arrested upon an order in a civil suit for conversion. While in custody under this order, which fixed his bail at \$70,000, he was taken to the office of a United States commissioner, where extradition proceedings were begun against him for his extradition to Great Britain upon a charge of forgery. While these proceedings were going on relator was transferred to the custody of the United States marshal. He was finally discharged on *habeas corpus*, by the circuit court of the United States, but was at once rearrested and taken to jail again by persons acting under the pretended authority or an instrument in writing indorsed upon a paper purporting to be an undertaking by bail in the civil suit in the state court. The prisoner knew nothing about this undertaking, but it had been given to the sheriff without his knowledge or consent. It was executed by S. and B., both strangers to the prisoner, and accepted by plaintiff's counsel by indorsement thereon. The instrument thus executed and accepted bore a further indorsement whereby B. assumed to depute two persons in his place and stead to arrest and surrender the prisoner to the sheriff in exoneration of B. as bail. On return of writ of *habeas corpus* the sheriff certified that he held the relator by virtue of this "surrender in exoneration of bail," and also by virtue of the order of arrest previously granted:

*Heid*, that S. and B. never lawfully became the bail of the prisoner, nor ever possessed any power to surrender him. The sheriff derived no authority to hold him from any act done by either of the

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self constituted sureties. (*People ex rel. Tully agt. Davidson, ante, 416.*)

8. The undertaking was a nullity so far as the prisoner was concerned. Strangers cannot be permitted to become bail for a man without his consent. The giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. They cannot be imposed upon him against his will:

*Held*, further, that the transfer of the relator to the custody of the federal authorities and the subsequent transaction in reference to the so-called bail bond, amounted at most to a voluntary escape and the sheriff had a right to retake him by virtue of the original order of arrest which had not become *functus officio* and that he is lawfully in the custody of the sheriff. (*Id.*)

## BANKRUPT.

1. Under section 5117 of the Revised Statutes of the United States, which provides that "no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy," those claims which have been incurred by any false representations or pretense of the bankrupt, or purchases made with the preconceived intent of not paying for them, are fraudulently contracted, and the debts thus arising are not discharged. (*Kaufman agt. Lindner, ante, 322.*)
2. The nature of the action and character of the claim is not to be determined by the demand of the complaint, for the reason that prior to the amendment of 1879 (*adding subdivision 4 to section 549 of the Code of Civil Procedure*), the complaint should not contain the allegations of fraud; but when the

affidavits upon which the order of arrest was granted discloses a claim incurred by the false representations of the bankrupt, it is not discharged by the proceedings in bankruptcy. (*Id.*)

## BASTARDY.

*See Costs.*

*Hellows agt. Lane, ante, 435.*

## BROOKLYN BRIDGE.

*See New York (City of).*

*The People ex rel. Stranahan agt. Thompson, ante, 491.*

## BURDEN OF PROOF.

1. Antecedent consideration is not sufficient to enable the holder of stolen negotiable bonds to hold them against the loser and owner before the robbery. (*Northampton National Bank agt. Kidder, ante, 95.*)
2. Possession does not create a presumption of ownership in the case of negotiable paper shown to have been stolen. The robbery reverses the usual rule as to the presumption. The holder after the robbery has the burden on him to prove value paid and parted with contemporaneously, good faith, purchase before maturity, &c. (*Wylie agt. Speyer, 62 Howard, 110, approved.*) (*Id.*)

## CASE.

1. An appellant is simply bound to present his case to the general term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case but disallowed by the trial judge. (*Kil-*

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*mer agt. N. Y. C. & H. R. R. R., 94 N. Y., 495 )*

2. It is not the object of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court, and they cannot therefore be properly referred to to ascertain the grounds of decision. (*Scott agt. Morgan, 94 N. Y., 508.*)

## CERTIORARI.

*See ABANDONMENT.*

*The People ex rel. Sherer agt. Walsh, ante, 482.*

## CODE OF PROCEDURE.

1. Section 99 — Statute of limitations—when the provisions of the new Code are applicable to causes of action existing at the time of its passage—Code of Civil Procedure, sections 399, 414. (*See Burgett agt. Strickland, 32 Hun, 264.*)
2. Section 121 — Dissolution of a corporation during the pendency of an action brought by it—the action is not thereby abated—it may be continued without an order of the court, by the receiver or by an assignee in bankruptcy—2 Revised Statutes (6th ed.), 393, section 11—United States Revised Statutes, 981, section 5047. (*See Platt agt. Ashman, 32 Hun, 230.*)
3. Section 135 — Service of a summons by publication—the affidavit must show that the defendant cannot, after due diligence, be found within the state. (*See Kennedy agt. N. Y. Life Insurance and Trust Co., 32 Hun, 30.*)
4. Section 244, sub. 5—The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the court of chancery before the adoption of the Code of

Procedure; it was continued by that Code (*subd. 5, sec. 244*), and is not abrogated by the provision of the Code of Civil Procedure (*sec. 713*), defining cases in which receivers may be appointed; but on the contrary is reaffirmed by the general provision of said Code (*sec. 4*), declaring that each of the courts therein named "shall continue to exercise the jurisdiction and powers now vested in it \* \* \* except as otherwise prescribed." (*Hallenbeck agt. Donnell, 94 N. Y., 342.*)

5. Section 871 — Costs on appeal from a justice's court—when governed by the old Code. (*See Atkins agt. Pitcher, 31 Hun, 352.*)

## CODE OF CIVIL PROCEDURE.

1. Chapter 4—Limitation of times within which claims must be enforced—to what claims the provisions of chapter 4 of the Code of Civil Procedure apply. (*See People ex rel. Sheridan agt. French, 31 Hun, 617.*)
2. Sections 4, 713 — The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the court of chancery before the adoption of the Code of Procedure; it was continued by that Code (*subd. 5, sec. 244*), and is not abrogated by the provision of the Code of Civil Procedure (*sec. 713*), defining cases in which receivers may be appointed; but on the contrary is reaffirmed by the general provision of said Code (*sec. 4*), declaring that each of the courts therein named "shall continue to exercise the jurisdiction and powers now vested in it \* \* \* except as otherwise prescribed." (*Hallenbeck agt. Donnell, 94 N. Y., 342.*)
3. Section 66—From the commencement of an action the attorney has a lien upon his client's cause of

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action, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they come, and cannot be affected by any settlement between the parties before or after judgment.

A settlement, after issue joined, had between the parties, although conclusive as to them, in no way affects the attorney, who may proceed in the action as if no settlement had been made.

But the lien cannot be enforced upon a mere motion to compel the defendant to pay the plaintiff's attorney his taxable costs by awarding a judgment therefor.

An application by "plaintiff's attorney" for an order directing the defendant to pay "his costs and counsel fee," or that he have judgment therefor, is not warranted by the practice. (*Smith* agt. *Baum*, ante, 267.)

4. Sections 190, 191, 997, 1001, 1336, 1350 — An order of general term affirming an interlocutory judgment is not appealable.

*It seems*, that the party aggrieved must wait until final judgment is entered, when he may either appeal directly to this court (*Code of Civil Procedure*, sec. 1336), in which case the appeal will bring up for review only the determination of the general term, affirming the interlocutory judgment, or he may appeal to the general term (sec. 1350), which appeal will bring up for review only the proceedings after the interlocutory judgment, and in case of affirmance he may appeal to this court, which appeal will present for review all the questions of law involved in the whole case.

*It seems*, also, that where the general term, on appeal from either the interlocutory or the final judgment, grants a new trial, an appeal may be taken to this court (Secs. 190, 191).

*It seems*, that a party aggrieved by an interlocutory judgment may also, after entry of the judgment,

move for a new trial (sec. 1001) on one or more exceptions contained in a case settled as prescribed (sec. 997), and from the order granting or refusing the motion, an appeal may be taken to this court (Sec. 190). (*Raynor* agt. *Raynor et al.*, 94 N. Y., 248.)

5. Section 335 — Undertaking — execution of, by one surety upon the condition that another shall be procured — when such surety may set up a breach of the condition as a defense to an action upon it. (*See Grimwood* agt. *Wilson*, 31 Hun, 215.)

6. Section 873 — A tenant cannot by a disclaimer, or by mere words denying his landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. The possession of the tenant and of his grantees and assigns is that of the landlord, and not hostile or adverse, and this is so as to a grantee who has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation.

The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof and notwithstanding any claim of the tenant or his successors to a hostile title. (*Whiting* agt. *Edmunds*, 94 N. Y., 309.)

7. Section 875 — Under the provision of this section of the Code of Civil Procedure, providing that the time during which a person who might maintain an action to recover real property is under a disability specified, "the time of such a disability is not a part of the time limited \* \* \* for commencing the action \* \* \* except that the time so limited cannot be extended more than ten years after the disability ceases."

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A party is always entitled to twenty years in which to bring his action, and in case of a disability, to so much more as the period of disability would add, except that such addition must not be more than ten years after the termination of the disability. The words "after the disability ceases" relate only to the extended time, and have no effect in any case to cut down or lessen the twenty years' limitation. (*Howell et al. agt. Icaritt et al.*, 95 N. Y., 617.)

8. Section 382 — Limitation of times within which claims must be enforced — to what claims the provisions of chapter 4 of the Code of Civil Procedure apply — application of such provisions where a demand is necessary. (See *French ex rel. Sheridan agt. French*, 31 Hun, 617.)

9. Section 399 — Statute of limitations — when the provisions of the new Code are applicable to causes of action existing at the time of its passage — Code of Civil Procedure, section 414 — Code of Procedure, section 99. (See *Burgett agt. Strickland*, 32 Hun, 264.)

10 Section 406 — Where in proceedings by a creditor for the sale of the real estate of a deceased person the statute of limitation is set up as a bar to the creditor's claim, as by the provisions of the statute authorizing the proceedings (*sec. 72, chap. 460, Laws of 1837, as amended by chap. 172, Laws of 1843, and chap. 298, Laws of 1847*), they cannot be commenced until after the accounting of the executor or administrator, the time between the death of the decedent and the accounting of the executor or administrator should not be included as part of the time limited (*Code of Civil Procedure, sec. 406*). (*Mead agt. Jenkins et al.*, 95 N. Y., 81.)

11. Section 410 — Limitation of

times within which claims must be enforced — to what claims the provisions of chapter 4 of the Code of Civil Procedure apply — application of such provisions where a demand is necessary. (See *People ex rel. Sheridan agt. French*, 31 Hun, 617.)

12. Section 414 — Statute of limitations — when the provisions of the new Code are applicable to causes of action existing at the time of its passage — Code of Civil Procedure, section 390 — Code of Procedure, section 99. (See *Burgett agt. Strickland*, 32 Hun, 264.)

13. Sections 414, 390 — The provision of the Code of Civil Procedure (*subd. 3, sec. 414*), exempting from the operation of the chapter (4), limiting the time for the commencement of actions, a case where a person was entitled to commence an action when the Code took effect, and declaring that in such a case "the provisions of law applicable thereto immediately before this act takes effect continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature.

Accordingly *held*, where plaintiff was entitled to, and had commenced his action before the Code went into effect, that the provision of said Code (*sec. 390*), making the statute of limitations of the place of residence of a non-resident defendant available as a defense in certain cases, did not apply; but that the case was governed by the rule in force when the Code went into effect, *i. e.*, that the statute of limitations of a foreign state constituted no defense to an action brought here. (*Clark agt. Lake Shore & Michigan Southern Railroad Co.*, 94 N. Y., 217.)

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14. Section 438—Execution—form of, when issued upon a judgment recovered in an action against an absconding debtor served by publication—Code of Civil Procedure, sections 438, 1370—when an execution and the sale had thereunder will be set aside. (*See Place* agt. *Riley*, 32 *Hun*, 17.)
15. Section 449—Surrogate's bond—right of the people to bring an action thereon against the sureties thereto. (*See People ex rel. Nash* agt. *Faulkner*, 31 *Hun*, 317.)
16. Section 468—An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. While the statute gives to the latter the custody and management of the infant's personal estate (2 *R. S.*, 150, *sec.* 3), the beneficial interest is in the infant and he may maintain the action. (*Segelken* agt. *Meyer*, 94 *N. Y.*, 473.)
17. Section 481, subdivision 2—Complaint—when the same transaction or instrument may be set out in more than one count. (*See Longprey* agt. *Yates*, 31 *Hun*, 432.)
18. Section 484—Joinder of cause of action—an action for a tort, and an action to recover, as upon an implied contract waiving the tort, cannot be united. (*See Teall* agt. *City of Syracuse*, 32 *Hun*, 332.)
19. Section 500—A denial in an answer as follows: "Defendant denies each and every allegation, averment and statement of the complaint, except such as are hereinafter admitted, qualified and explained," is bad whenever the objection is raised by demurrer or special motion. (*Potter* agt. *Frail*, *ante*, 445.)
20. Section 500—In an action by one domestic corporation against another domestic corporation the answer was as follows: "The defendant answering the complaint of the plaintiff, upon information and belief, alleges: "First, that it admits that both plaintiff and defendant are domestic corporations; second, it denies each and every allegation in said complaint contained:"  
*Held*, that the answer was frivolous. It did not deny that it did not have knowledge or information sufficient to form a belief of either of the allegations contained in the complaint. Neither did it in direct terms deny either of such allegations. It was so substantially defective as to create no issue in the case. (*Pratt Manufacturing Co.* agt. *Jordan Iron and Chemical Co.*, *ante*, 230.)
21. Section 522—The complaint in an action to foreclose a mortgage alleged that the mortgage, with accompanying bond, was executed and delivered to the mortgagees named, to secure the payment of \$4,000, and that it was duly assigned and transferred to plaintiff; the answer admitted the execution of the securities as alleged, and the due assignment thereof to the plaintiff, but averred that they were made in pursuance of an usurious agreement with the plaintiff. The trial court found the usurious agreement substantially as alleged, and that the bond and mortgage was never delivered to, or in the possession of, the mortgagees: *Held*, that in the absence of any waiver of the admission in the pleadings, this last finding was error. (*Dunham* agt. *Cudlipp*, 94 *N. Y.*, 129.)
22. Sections 523, 529—Where a party would be privileged from testifying as a witness concerning the matters alleged, he need not verify his answer. He is privileged where the answer will have a tendency to accuse him of a crime or misdemeanor, or to expose him to a penalty or forfeiture.  
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creditors furnishes an exceptional case by force of section 529. (*Frist et al. agt. Clinum, ante, 214.*)

23. Section 544 — Where plaintiff's cause of action is upon a promissory note made by defendant to plaintiff's order, and defendant admits the making of the note, but alleges by way of avoidance that since the making and delivery of said note he made and delivered a certain other note as a renewal of the note sued on, and that the latter note was outstanding and not matured, the plaintiff should have leave by supplemental complaint to allege the fact that the note pleaded in defendant's answer as payment of the note in suit was not paid and was in plaintiff's possession, and to pray that he may tender the same on the trial. (*Cohn agt. Husson, ante, 461.*)

24. Section 549 — In an action upon contract the imperative requirement is, that it must be alleged in the complaint that the defendant was guilty of fraud.

Where there is no complaint presented with the motion for the arrest, and the affidavits do not aver what the allegations of the complaint were, the order of arrest will be vacated. (*Straus agt. Kreis, ante, 275.*)

25. Section 550 — In cases where, under this section of the Code of Civil Procedure, the right to arrest depends upon facts extrinsic the cause of action, and where no execution against the person can issue unless an order of arrest has been obtained and executed before judgment, these extrinsic matters need not be alleged in the complaint, and if alleged, are immaterial to the cause of action and need not be proved upon the trial. (*Segelken agt. Meyer, 94 N. Y., 478.*)

26. Section 559 — Order of arrest — deposit in lieu of the undertaking required by this section of the

Code of Civil Procedure — right of the defendant to have his costs for vacating the order of arrest paid therefrom before the trial of the action. (*See Tunstall agt. Winton, 31 Hun, 231.*)

27. Sections 600, 601 — Where the bail apply to be exonerated on account of the death of their principal, the application must be made before their time for answering expires. (*Walsh agt. Schulz, ante, 178.*)

28. Section 629 — Temporary injunction — application to dissolve it, on giving an undertaking — Code of Civil Procedure, section 629, as amended by chapter 404 of 1893 — the undertaking must comply with it strictly. (*See Chamberlain agt. Buffalo, N. Y. and P. R. R. Co., 31 Hun, 339.*)

29. Section 635 — Attachment — it cannot issue in an action brought to enforce a statutory liability — Code of Civil Procedure, section 8247. (*See Remington agt. O'Dougherty, 32 Hun, 255.*)

30. Section 636 — An attachment issued against a firm doing business in Chicago, Ill.; one of the partners had his domicile in this state, but a part of each year he resided in Chicago:

*Held, proper.*

The place of business of a firm at which its operations are carried on, and where the partners are either continually or at times to manage the business, can properly be called the residence of each of the partners within this section of the Code of Civil Procedure.

An attachment against a non-resident will not be vacated on proof that the property attached belongs to a third person. (*McKinlay agt. Fowler, ante, 388.*)

31. Section 638 — Attachment — may be vacated on motion after it has become inoperative by reason of a failure to serve the summons.

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(See *Betzemann* agt. *Brooks*, 81 *Hun*, 271.)

32. Section 649—A bond, promissory note or other instrument for the payment of money can be attached only by taking the same into the sheriff's actual custody.

Leaving a certified copy of the warrant with the usual notice upon a person having in his custody a bond belonging to the defendant in attachment is ineffectual to attach such bond.

A delivery of the bond claimed to be attached does not relate back to the time of the service of the warrant so as to vest title in the sheriff from that date. Neither the obligor in the bond nor the sheriff can set up the fraudulent character of the transfer of such bond to an assignee in an action thereon.

The Code of Civil Procedure (*sec. 649, sub. 2*) has made no change by which bonds, promissory notes, &c., are subjected to the rules governing the attachment of goods and chattels, except as to the manner in which the attachment is effected (*Thurber* agt. *Blanck*, 50 *N. Y.*, 80; and *Castle* agt. *Lewis*, 78 *N. Y.*, 137, followed and approved; *Anthony* agt. *Wood*, 29 *Hun*, 239, reversed). (*Anthony* agt. *Wood*, ante, 424.)

33. Sections 655, 675—Attachment duty of the sheriff to collect and hold demands attached. (See *Davidson* agt. *Chatham Nat. Bank*, 32 *Hun*, 138.)

34. Section 683—Motion to vacate an attachment—power of the court to amend the warrant—limitation upon the right of the plaintiff to oppose the motion by new proof—waiver of objection to the new proof offered—Code of Civil Procedure, section 723. (See *Kibbe* agt. *Wetmore*, 31 *Hun*, 424.)

35. Section 708—The provision of this section of the Code of Civil Procedure (*sub. 3*) declaring that a

person who willfully conceals or withholds from the sheriff property which he has attached, but which has passed out of his hands, shall be liable to double damages "at the suit of the party aggrieved," gives to the attachment and execution creditor a right of action when aggrieved. (*Scott et al.* agt. *Morgan*, 94 *N. Y.*, 508.)

36. Section 723—Motion to vacate an attachment—power of the court to amend the warrant—limitation upon the right of the plaintiff to oppose the motion by new proof—waiver of objections to the new proof offered—Code of Civil Procedure, section 683. (See *Kibbe* agt. *Wetmore*, 31 *Hun*, 424.)

37. Section 723—Amendments—a new party may be made a defendant after a demurrer alleging a defect of parties defendant has been interposed. (See *Lewin* agt. *Wright*, 31 *Hun*, 327.)

38. Section 738—There is no statutory authority allowing one joint debtor or partner to make an offer of judgment in behalf of his joint debtor or copartner. "The like offer," as used in this section of the Code of Civil Procedure, means that judgment must be taken against him who makes the offer if separate judgment can be taken.

Section 1932 of the Code of Civil Procedure, allowing judgments to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers. (*Garrison* agt. *Garrison*, ante, 271.)

39. Section 756—Under the provisions of this section of the Code of Civil Procedure, where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing

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supplemental pleadings, or an amendment of the complaint, aside from such substitution the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion. (*Smith* agt. *Zalinski*, 94 N. Y., 519.)

40. Section 772 — Practice—one justice of the supreme court cannot review the decision of another, except as to provisional remedies and the cases arising under this section of the Code of Civil Procedure. (*See People* agt. *Nat. Trust Co.*, 31 Hun, 20.)

41. Sections 791, 793 — When an action is brought upon a judgment rendered in a chancery court in the state of Tennessee in an action on a policy of fire insurance on motion for a preference on the calendar:

*Held*, that the action being against a corporation, and founded upon a judgment, which is an evidence of debt for the absolute payment of money, the right to a preference appears upon the face of the pleadings, and is absolute without any qualification or condition of any kind. It is a right given by statute, which no court can by rules or otherwise limit or abridge. (*McArthur* agt. *Commercial Fire Insurance Company*, ante, 510.)

42. Sections 823, 971, 1003 — The fact that in an action to foreclose a mortgage the sale of the mortgaged premises may result in a deficiency, for which a money judgment may be docketed against the defendant liable for such deficiency, does not entitle him as matter of right to a jury trial; the action is in equity and is triable by the court.

Where in such case the court directs any matter of fact to be tried by a jury as authorized by these sections of the Code of Civil Procedure, and where after

such trial the court disregards the verdict and makes its own findings, the case is to be reviewed on appeal, on the findings and decisions of the court, as if there had been no submission of any fact to the jury. (*Carroll et al.* agt. *Deimel et al.*, 95 N. Y., 232.)

43. Section 829 — Evidence — when a party, seeking to enforce a claim which originally existed against a person who has since died, is competent to testify as to personal transactions between himself and such deceased person in respect to such claim. (*Stephens* agt. *Cornell*, 32 Hun, 414.)

44. Section 829 — Evidence — personal transactions with a deceased person — what are to be considered as such — when a party to the transaction cannot testify as to what was said and done by the others in his presence. (*See Wilson* agt. *Reynolds*, 31 Hun, 46.)

45. Section 829 — Evidence — when the holder of a note does not derive his title or interest thereto from the person who delivers it to him. (*See Converse* agt. *Cook*, 31 Hun, 417.)

46. Section 829 — Evidence — when a witness is interested in the event of the action. (*See Barton* agt. *Scramling*, 31 Hun, 467.)

47. Section 829 — In an action brought by the heirs of a deceased grantor to set aside his conveyance on the ground of undue influence, his widow, who as his wife joined in the conveyance, is "a person interested in the event of the action" within the meaning of this section of the Code of Civil Procedure, and as such is incompetent to testify to personal transactions or communications between her and the deceased. (*Sanford et al.* agt. *Elithorpe et al.*, 95 N. Y., 48.)

48. Section 829 — The opinion of a witness, not an expert, as to the

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mental condition of another is not competent, save in the case of a subscribing witness to a will, although based upon what the witness himself saw and heard.

The extent to which the examination of such a witness may go is this, where he has testified to facts within his knowledge and observation, *i. e.*, acts and declarations of the person whose mental condition is the subject of inquiry, tending to show soundness or unsoundness of mind, he may characterize them as rational or irrational; his testimony must be limited to his conclusions from the facts testified to by him.

Where, therefore, in an action to set aside an assignment of a bond and mortgage because of the mental incapacity of the assignor, a witness not an expert, was allowed to testify under objection and exception that from what he had observed of the acts and conversations of the assignor he considered "his mind was gone;" and other witnesses after testifying to interviews with, and acts of the assignor, in answer to questions, asking them to characterize his condition, pronounced him imbecile: *Held*, that the testimony was incompetent, and its reception error.

The action was brought by the administrator of the assignor: *Held*, that his next of kin were interested in the event of the action within the meaning of this provision of this section of the Code of Civil Procedure excluding such witnesses from testifying to "personal transactions or communications" between themselves and the deceased. (*Holcomb* agt. *Holcomb*, 95 N. Y., 316.)

49. Section 829 — Probate was contested by the heirs-at-law. It appeared that through partial paralysis of the vocal organs, the testator at the time he executed his will was unable to utter words, but he made sounds intelligible to those familiar with him, and signs, which to some extent any one

could interpret. His wife went with him to the house of the scrivener who drew the will. She was executrix and legatee: *Held*, that she was incompetent under this section of the Code of Civil Procedure, to testify to anything said by her to the testator, or to what he communicated to her or others, in reply. (*Lane* agt. *Lane*, 95 N. Y., 494.)

50. Section 829 — In proceedings for the probate of a will the executor who presented the will for probate, and who was the principal legatee, after proving the loss of a former will, drawn by him, and executed by the testatrix, was permitted to testify to its contents, and was also allowed, after testifying that he had an interview with the decedent, to testify that a memorandum produced was made by him at the house of the testatrix, at the time of the interview, and that from it another prior will was drawn by him: *Held*, error; that the evidence was "concerning a personal transaction or communication between the witness and the deceased" within the meaning of this section of the Code of Civil Procedure. (*Matter of Will of Smith*, 95 N. Y., 517.)

51. Section 870 — Action against the president or treasurer of an unincorporated association — the officer so sued cannot be examined as a party before trial — Code of Civil Procedure, section 1919. (*See* *Duncan* agt. *Jones*, 32 Hun, 12.)

52. Section 872 — A plaintiff in an action has the right, under the Code of Civil Procedure, to an order for the examination of one of two defendants, to prove a co-partnership between the defendants. (*Goldberg* agt. *Roberts*, ante, 269.)

53. Section 872, subdivision 4 — Examination of a party before trial — the testimony must be

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- shown to be material and necessary—general rule No. 83—right to examine the president of a joint-stock association in an action against it. (*See Wayne County Savings Bank* agt. *Brackett*, 31 *Hun*, 484.)
54. Section 873—Order for the examination of a party before trial—not granted to enable the party seeking it to prove that his adversary is guilty of a crime of fraud. (*See Andrews* agt. *Prince*, 31 *Hun*, 233.)
55. Section 886—Practice—a party to an action cannot be compelled to appear for examination before trial in any county other than the one in which he resides or has an office. (*See Gustaf* agt. *American Steamship Co.*, 31 *Hun*, 95.)
56. Section 923—Notary—certificate as to protest of note and service of notice—a second certificate may be made if the first be lost. (*See Kellam* agt. *McKoon*, 31 *Hun*, 519.)
57. Sections 956, 957, 958—The provisions of these sections of the Code of Civil Procedure, making certified copies of the records of foreign countries evidence and prescribing the manner of authentication, have no application to such a trial of an indictment for forgery. (*The People* agt. *D'Argencour*, 95 *N. Y.*, 624.)
58. Section 977—Though under ordinary circumstances the party only who has noticed a cause for trial can move it for that purpose, yet when a cause has been specially set down for the day on which it was moved, and no objection was made to the right of the defendant to move it, and the plaintiff's counsel, after the jury was drawn, simply refused to proceed with the trial, the court was justified in directing a dismissal of the complaint. (*Haberstich* agt. *Fischer*, ante, 318.)
59. Sections 982, 983, 984, 987—Place of trial—power of the court to change it. (*See Gorman* agt. *South Boston Iron Co.*, 32 *Hun*, 71.)
60. Section 998—Commissions—when allowed upon a fund held by an executor as trustee, in addition to those allowed to him as executor—when an executor will be charged with interest because of his failure to invest a fund in his hands—what errors can be corrected upon an appeal from such a decree without any case being prepared and settled. (*See Matter of Jackson*, 32 *Hun*, 200.)
61. Section 1002—Motion—a decision of one justice cannot be reviewed at a special term held by another. (*See Tunstall* agt. *Winton*, 31 *Hun*, 222.)
62. Section 1019—A referee, under this section of the Code of Civil Procedure, will not have done his duty unless he delivers his report to the clerk to be filed in case it is not taken up by one of the attorneys within sixty days.  
Notification to the plaintiff's or defendant's attorneys by the referee that his report is ready and at their disposal, on payment of his fees (naming the amount), is not to be deemed a sufficient delivery to prevent the forfeiture of his fees or the termination of the reference under this section of the Code.  
(*See Thornton* agt. *Thornton*, 66 *How.*, 119, where the same cases are cited and a different conclusion reached by HAIGHT, J.) (*Little* agt. *Lynch*, ante, 1.)
63. Section 1013—Reference—an action to charge lands in the hands of heirs or devisees with debts of an ancestor is only referable by consent—when the right to appeal is not lost by participating in the reference. (*See Read* agt. *Lozin*, 31 *Hun*, 286.)
64. Section 1018—Costs—where,

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- on a trial before a referee the plaintiff recovers a judgment against one of the defendants, the other defendant can only have costs awarded to him upon a motion to the court—Code of Civil Procedure, section 3220. (*See New York Elevated R. R. Co. agt. McDaniel*, 31 Hun, 310.)
65. Sections 1228, 1229 — Action for divorce—power of the special term to review the report of a referee—it can only refuse to confirm it because of fraud or collusion. (*See Ross agt. Ross*, 31 Hun, 140.)
66. Sections 1246, 1247 — Transcript of a judgment—how it must be attested to authorize a county clerk to docket it. (*See People ex rel. Crittenden agt. Keenan*, 31 Hun, 625.)
67. Section 1268 — Under section 5117 of the Revised Statutes of the United States, which provides that "no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy," those claims which have been incurred by any false representations or pretense of the bankrupt, or purchases made with the preconceived intent of not paying for them, are fraudulently contracted and the debts thus arising are not discharged. (*Kaufman agt. Lindner*, ante, 322.)
68. Section 1279 — The affidavit required by this section of the Code of Civil Procedure, to accompany the case on submission of a controversy upon admitted facts, must be made by one of the parties where there is a natural person a party by whom it may be made; an affidavit of an attorney of one of the parties is insufficient. (*Bloomfield agt. Ketcham*, 95 N. Y., 657.)
69. Section 1301, 1316 — Where a notice of appeal from a final judgment does not specify and gives no notice of an intention to review an interlocutory judgment, the latter, as to all points covered thereby, is to be taken as the settled law of the case, and is not open for review upon the appeal. (*Reese agt. Smith*, 95 N. Y., 645.)
70. Section 1312 — An application for an order dispensing with or limiting the security required to stay execution on appeal to this court, may not be made here, but should be made to the court "in or from which the appeal is taken." It seems that the only cases where the application may be made to the court to which the appeal is taken (except where the appeal is in the same court which rendered the judgment or made the order appealed from) are those where the appeal is to the supreme court from an inferior court or to a general term of the supreme court, or of a superior city court in a special proceeding. (*Hills agt. The People Savings Bank et al.*, 95 N. Y., 676.)
71. Section 1318 — Although the Code provides that an appeal must be taken from the order denying a new trial, an appeal taken before the judgment of reversal is entered is ineffectual to review the judgment. (*Vernon et al. agt. Palmer*, ante, 18.)
72. Section 1327 — Undertaking on appeal — when it is insufficient. (*See Hollister agt. McNeill*, 31 Hun, 629.)
73. Section 1349 — Appeal — it lies from an order overruling a demurrer. (*See Hand agt. Supervisors of Columbia Co.*, 31 Hun, 531.)
74. Section 1370 — Execution—form of, when issued upon a judgment recovered in an action against an absconding debtor served by publication—Code of Civil Procedure, sections 438, 1370 — when an execution and the sale had thereunder will be set aside. (*See Place agt. Riley*, 32 Hun, 17.)

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75. Sections 1421 to 1425 — These sections of the Code of Civil Procedure, which authorize the substitution of indemnitors to the sheriff as defendants in his place and stead, are not unconstitutional (*Reversing S. C.*, 66 *How.*, 354).

The right of action of the injured party is not thereby taken away or rendered ineffectual, but its enforcement is simply confined to the actual trespasses.

The right to sue a specific individual is not a constitutional right which cannot be taken away where adequate and complete protection to the right of property is left. (*Hein* agt. *Davidson*, ante, 148.)

76. Sections 1441-1461 — Tenants in common — in an action for partition no allowance will be made for improvements made by one without the assent of his cotenant — no allowance is made to a purchaser under an execution sale for improvements made before the time to redeem has expired. (*See Ford* agt. *Knapp*, 31 *Hun*, 522.)

77. Section 1487 — The complaint alleged the employment of defendant as attorney, etc., and that while so employed he received the money in question "in a fiduciary capacity," that the same had been demanded, but that he neglected and refused to pay the same and had converted it to his own use: *Held*, that the cause of action was one *ex contractu* not *ex delicto*.

Also *held*, that proof that defendant had received money to which plaintiff was entitled was sufficient to sustain the action; that notwithstanding the allegation that defendant received it in a fiduciary capacity, if no order of arrest had been granted during the pendency of the action, the effect of the judgment would not be to subject defendant to an execution against his person, and so proof of the allegation was not essential. (*Segelken* agt. *Meyer*, 94 *N. Y.*, 473.)

78. Section 1533 — Partition — no

sale can be ordered in an action brought by one tenant in common of a vested remainder — effect of the consent of the owner of the prior estate. (*See Scheu* agt. *Lahning*, 31 *Hun*, 183.)

79. Section 1695 — A warrant for the collection of taxes is not invalidated by the omission of the dollar sign before the figures — replevin will not lie where the warrant is regular on its face. (*See American Tool Co.* agt. *Smith*, 32 *Hun*, 121.)

80. Section 1721 — Action to recover a chattel — when the facts showing the detention to be unlawful need not be specifically alleged in the complaint. (*See Chapin* agt. *Merchants' Nat. Bank*, 31 *Hun*, 529.)

81. Section 1721 — Action to recover a chattel wrongfully detained — when the facts showing the detention to be wrongful should be stated in the complaint. (*See Davenport Glucose Mfg. Co.* agt. *Tausig*, 31 *Hun*, 563.)

82. Sections 1737, 1741 — Action to foreclose a lien upon a chattel — a warrant to the sheriff to seize and hold the chattel does not protect him in taking it from the possession of one who is not a party to the action, and claims to be the owner thereof. (*See Carpenter* agt. *Lott*, 31 *Hun*, 349.)

83. Section 1769 — Action for a limited divorce — no allowance for counsel fees can be made after a judgment has been entered. (*See Winton* agt. *Winton*, 31 *Hun*, 290.)

84. Sections 1773, 2281 — The provisions of the Code of Civil Procedure for fine and imprisonment of a husband in default for non-payment of alimony do not interfere with or restrict the power of the court to strike out the answer of a disobedient defendant in a divorce suit. (*Brisbane* agt. *Brisbane*, ante, 184.)

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85. Section 1779 — Pleadings — allegation that the defendant is a corporation — what averments in the answer do not raise an issue as to this fact. (*See Gustaf* agt. *American Steamship Co.*, 81 *Hun*, 95.)
86. Section 1780, subdivision 3 — Cause of action — where it arises — when the court has jurisdiction of an action between two foreign governments. (*See Toronto Trust Co.* agt. *Chicago, B. and Q. R. R. Co.*, 82 *Hun*, 190.)
87. Sections 1835, 1836 — Where a claim was presented to J., an attorney of an executor, and was disputed and an offer was made to refer the same under the statute, and afterwards plaintiff's attorneys served upon J. a written notice directed to him as attorney for the executor renewing plaintiff's offer to refer and to appear before the surrogate at such reasonable time as he, J., should name to have the reference agreed upon and perfected, concluding as follows: "And you will also take notice that your omission to appoint a time for a meeting before the surrogate will be regarded as a refusal to refer." And in response to such notice the plaintiff's attorneys were served with a written notice from J. stating, in substance, that the alleged claim had been withdrawn by the person who presented it and that there was "no subject-matter for a reference and no occasion for the choice of a referee:"
- Held*, that this amounted to a refusal to refer and is sufficient to entitle plaintiff to costs, &c., unless the withdrawal of the claim as alleged would prevent. But the defendants having alleged such withdrawal should establish it affirmatively.
- The plaintiff's attorneys having pressed their claim continually, and defendants having had every opportunity to refer before the commencement of the action, they not having taken steps to secure a proposed reference, the plaintiff having succeeded is entitled to recover his taxable costs and disbursements. (*Wilkinson* agt. *Littlewood*, *ante*, 474.)
88. Sections 1835, 1836 — Where a claim against a decedent's estate is materially reduced upon a reference under the statute thus making it plain that payment thereof has not been unreasonably resisted or neglected, neither costs nor disbursements can be recovered by the claimant under these sections of the Code of Civil Procedure.
- The law granting disbursements as a matter of right in cases of this kind is in the Code of Procedure (*sec.* 817), and section 8246 of the Code of Civil Procedure takes the place of this section of the old Code and does not give disbursements as a matter of right. Disbursements then, like costs, are to be awarded by the court as provided in these sections of the Code of Civil Procedure (*R. S.*, *part 2*, *title 8*, *chap. 6*, *sec.* 87). They do not belong to the prevailing party in such cases as a matter of right. (*Miller* agt. *Miller et al.*, *ante*, 135.)
89. Section 1361 — The complaint, in an action under this section of the Code of Criminal Procedure to establish a will, alleged in substance that the testator, an inhabitant of, and domiciled in the county of R., in this state, and possessed of personal property therein, but temporarily residing in Spain, duly signed, published, declared and executed the instrument in question before a notary, that it remains on file in the office of the notary, from which, by reason of the laws of Spain, it cannot be taken, and that plaintiff is a legatee under the will: *Held*, that a case was made out of authorizing the action. (*Younger* agt. *Duffie*, 94 *N. Y.*, 535.)
90. Section 1871 — An execution against property must be issued before a creditor's suit can be

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- maintained, and the fact that the debtor himself may be deceased forms no legal excuse for the omission to issue the execution. (*Lichtenberg* agt. *Hertfelder*, ante, 196.)
91. Section 1902 — Action for negligent killing — will not lie against the personal representatives of the wrong-doer — 1847, chapter 450 — 1849, chapter 256 — 1870, chapter 78. (*See Hegerich* agt. *Keddie*, 82 *Hun*, 141.)
92. Section 1919 — Right to examine the president of a joint-stock association in an action against the association in his name as president. (*See Wayne Co. Savings Bank* agt. *Brackett*, 81 *Hun*, 434.)
93. Section 1919 — Unincorporated association — actions against — upon whom the summons may be served when it has no president or treasurer. (*See Hathaway* agt. *American Mining Stock Exchange*, 81 *Hun*, 575.)
94. Section 1919 — Action against the president or treasurer of an unincorporated association — the officer so sued cannot be examined as a party before trial — Code of Civil Procedure, section 870. (*See Duncan* agt. *Jones*, 32 *Hun*, 12.)
95. Section 1932 — This section of the Code of Civil Procedure, allowing judgments to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers. (*Garrison* agt. *Garrison*, ante, 271.)
96. Sections 2269, 2272 — Reference — power of a referee to punish for a contempt — when he may make the order to show cause returnable before the court — duty of the court when the order is so made. (*See Naylor* agt. *Naylor*, 32 *Hun*, 228.)
97. Section 2283 — A surety on an undertaking on which an order of arrest was granted, who swears falsely as to his pecuniary responsibility, is guilty of perjury, which is a contempt of court, and the court is empowered to punish that offense by imposing a fine sufficient to indemnify the defendant for the loss and injury he has sustained through the surety's misconduct, and by imprisoning him for six months, and until the fine is paid. (*Stephenson* agt. *Hanson*, ante, 305.)
98. Section 2366 — The submission of a cause of action to arbitrators is in legal effect a discontinuance of an action pending thereon, although the arbitrators have not consented to act; and their subsequent failure or refusal to take upon themselves the duties of the arbitration does not revive the action.  
This result follows, although the submission is not acknowledged as prescribed by this section of the Code of Civil Procedure. (*McNulty* agt. *Solley*, 95 *N. Y.*, 242.)
99. Sections 2435, 2436, 2460 — The examination of debtors in supplementary proceedings, who had made an assignment for the benefit of creditors should not be restricted to property acquired by them since the assignment, but may cover an inquiry "concerning their property," whether equitable or legal, including their property transferred to another with the apparent intent to hinder, delay or defraud their creditors. (*Selligman et al.* agt. *Wallach*, ante, 514.)
100. Sections 2453, 526 — The verification to a petition upon which a citation was issued by a surrogate, requiring an executor to show cause why he should not file an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the

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- same are true:" *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so, that there was a substantial compliance with the provisions of these sections of the Code of Civil Procedure. (*Matter of Application, etc., of Macaulay, 94 N. Y., 574.*)
101. Sections 2472, 2481—Surrogates have power to compel a purchaser of real estate to take or to discharge a purchaser from taking. (*Matter of Lynch, ante, 436.*)
102. Section 2481—The surrogate has power, under this section of the Code of Civil Procedure, to open, vacate or set aside decrees in final accountings of executors. (*Matter of Tilden, ante, 447.*)
103. Sections 2484, 2485—These sections are constitutional. (*See People ex rel. Oakley agt. Petty, 82 Hun, 443.*)
104. Section 2486—Practice—trial of an action at a special term in case of the disability of the surrogate—Code of Civil Procedure, sections 2545, 2486—requests for findings—power of the justice to allow them after the case has been submitted—General Rule No. 82. (*See Matter of Chauncey, 82 Hun, 429.*)
105. Sections 2525, 2586—The executor was a non-resident. The surrogate made an order directing service of the citation either personally without the state or by publication. Less than six weeks intervened between the day the citation was issued and the day named therein for the return thereof. It was served personally in another state more than thirty days before the return day: *Held*, that the service was sufficient (*Code, sec. 2525*); that as service by publication was not resorted to, it was not requisite that the six weeks required for publication should intervene, nor was it necessary to publish the citation in the state paper, as that is only required when service is by publication (*Sec. 2586*). (*Matter of Application, etc., of Macaulay, 94 N. Y., 574.*)
106. Section 2545—In proceedings for the probate of a will the executor who presented the will for probate, and who was the principal legatee, after proving the loss of a former will, drawn by him, and executed by the testatrix, was permitted to testify to its contents, and was also allowed, after testifying that he had an interview with the decedent, to testify that a memorandum produced was made by him at the house of the testatrix, at the time of the interview, and that from it another prior will was drawn by him: *Held*, error; that the evidence was "concerning a personal transaction or communication between the witness and the deceased," within the meaning of this section of the Code of Civil Procedure. (*Matter of Will of Smith, 95 N. Y., 517.*)
107. Section 2545—Decision of an issue of fact by a surrogate—he must file findings of fact and conclusions of law—what papers must be presented to the general term on an appeal from his decision. (*See Waldo agt. Waldo, 82 Hun, 251.*)
108. Section 2546—Practice—trial of an action at a special term in case of the disability of the surrogate—Code of Civil Procedure, sections 2545, 2486—requests for findings—power of the justice to allow them after the case has been submitted—General Rule No. 82. (*See Matter of Chauncey, 82 Hun, 429.*)
109. Section 2614—Under the provisions of this section of the Code of Civil Procedure, requiring in proceedings for the probate of a will, the presentation of a written

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petition "describing the will" it is not essential, in order to give the surrogate jurisdiction, where the will was executed in duplicate, that this fact should be stated in the petition. (*Crossman et al. agt. Crossman et al.*, 95 N. Y., 145.)

110. Section 2618—The proponents of a paper which is claimed to be this decedent's will lately finished the presentation of their proofs. The contestant, through her counsel, thereupon filed an affidavit alleging facts which tend to show that the testimony of certain persons in such affidavit named "may be material" to the issues of this proceeding. The contestant also caused to be filed and to be served upon the proponents a notice to the effect that, before proceeding to introduce proofs in opposition to probate, she required the examination of the persons in such affidavit named:

*Held, first*, that the duty of producing such witnesses falls upon parties proponent, not because the statute so declares, but because, as it fails to impose that duty upon parties contestant, they can rest securely upon the fact that, until such witnesses have been produced and examined, the will cannot be admitted to probate.

*Second*. The course of the examination of witnesses brought into court by proponents at the instance of contestants, is a matter purely in the discretion of the surrogate. Such witnesses must be examined, because the law demands their examination, whenever the proper notice has been filed and the surrogate has found them to be material. They are not to be charged, so to speak, to the account of either party. They are to be examined by the surrogate. The surrogate can require counsel to assist him in the examination. Neither party can demand, as of right, the opportunity of first examining the witness who has been produced in pursuance of the notice, and neither party can demand, as of

right, that his opponent shall begin such examination. The surrogate should see to it that both parties are afforded a fair opportunity for full and searching investigations. In most instances, where witnesses shall be thus brought into court at the request of contestants, it will be the most natural course to call upon the contestants themselves to pursue the inquiry in the first instance, because, presumably, they will be better advised than their adversaries as to the precise matters which they wish and expect to prove; but in such cases a direction to the contestants to begin the inquiry, will not of itself involve any limitation upon their right of making that inquiry as searching and thorough as they would have been permitted to make it if the witness had been voluntarily produced by the opposite party and had testified in its behalf.

*Third*. As to when witnesses produced in accordance with this section of the Code of Civil Procedure are to be examined, it is a mere question of the order of proof, and is entirely within the discretion of the surrogate. In the exercise of such discretion he would ordinarily permit the party applying for the examination to decide for himself when that examination should be had. (*Matter of Hoyt, ante*, 57.)

111. Section 2620 — A regular attestation clause, shown to have been signed by the witnesses and corroborated either by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of due execution, or other competent evidence, is sufficient to establish the execution of a will signed by the testator, even against the positive testimony to the contrary of the subscribing witnesses. (*Matter of Will of Cottrell*, 95 N. Y., 329.)

112. Section 2647 — In proceedings

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taken under the Revised Statutes (2 R. S., 61, *sec. 30 et seq.*), for the revocation of the probate of a will of personal property, the contestant is not confined to matters which were not investigated and tried when the will was admitted to probate, but the whole case is left open, and he has the right to have the questions then litigated and determined tried, the same as if no adjudication had been had thereon.

To bring a case within the one year's limit fixed by said statute (*sec. 32*) it was not essential to have a citation issued within the year; it was sufficient if the requisite allegations were filed with the surrogate within that time.

*It seems* that the rule is the same under this section of the Code of Civil Procedure, save that a petition in the form prescribed is required to be filed within the year, instead of allegations. (*Matter of Will of Gouraud*, 95 N. Y., 256.)

113. Section 2650—Surrogate, power of, to direct an executor to pay a legacy pending an application to revoke the probate of a will. (*See Matter of Hoyt*, 31 Hun, 176.)

114. Section 2668—Temporary administrator—the special guardian of an infant may apply for his appointment—the discretion of the surrogate in granting the application will not be reviewed. (*See Matter of Chase*, 32 Hun, 318.)

115. Sections 2717, 2718, 2719—Surrogate, power of, to direct an executor to pay a legacy pending an application to revoke the probate of a will. (*See Matter of Hoyt*, 31 Hun, 176.)

116. Sections 2717, 2718, 2723—The provision of the said Code, requiring the surrogate to dismiss such a petition when it is not proved to the satisfaction of the surrogate that there are assets applicable to the payment of the

claim of the petitioner, which may be so applied without injuriously affecting the rights of others (*sec. 2718, subd. 2*), does not require a reference to that subject in the petition, or that proof shall be made before the issuing of an order requiring an accounting; but upon return of the citation, if issued upon a petition showing the petitioner to be entitled to a legacy, and that more than a year has elapsed since letters testamentary were issued (*sec. 2717, subd. 2*), the surrogate is authorized to make the order requiring the executor to account (*sec. 2723, subd. 3*); and when that is complied with, if the surrogate is not satisfied that there are in the hands of the executor assets properly applicable to the payment of the petitioner's claim it is his duty to dismiss the petition. (*Matter of Application, etc., of Macaulay*, 94 N. Y., 574.)

117. Section 2793—Except in the case of dower, which is provided for by this section of the Code of Civil Procedure, whether the widow shall have a gross sum in lieu of a life estate rests in the discretion of the court. (*In Matter, etc., of Zahrt*, 94 N. Y., 605.)

118. Sections 2803, 2804, 2805—A petition presented to a surrogate set forth that J. was trustee under the will of McC.; that the petitioner was, by the terms of the will, entitled to the interest on the trust fund, which was so invested as to yield an annual income, of which at least \$337.50 was then in the hands of the trustee, and that he refused to pay it over, claiming that the petitioner had assigned his interest, which claim, the petitioner averred, was unfounded: *Held*, that the petition was sufficient to entitle the petitioner, under the Code of Civil Procedure, (*secs. 2803, 2804*), to an order for an accounting.

The answer did not deny the validity or legality of the peti-

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- tioner's claim, but set up the pendency of an action in which the trustee was plaintiff and the petitioner and others were defendants, for the purpose of settling conflicting claims, alleged by the trustee to have been made upon the fund and its income. No proof was given in support of these allegations: *Held*, the facts stated did not in any way tend to show that the petitioner's claim was of doubtful validity, or that the action was necessary; but if this were otherwise, in the absence of the denial of validity or legality required by the Code (*sec.* 2805), the pendency of the action was immaterial and was no bar to an accounting. (*Matter of Estate of McCarter*, 94 N. Y., 558.)
119. Section 8044—Highway—encroachments upon it—certificate of a jury summoned under section 105 of 1 Revised Statutes, 522—question as to whether an appeal lies therefrom to the county court. (*See Commissioners of Jamaica agt. Allen*, 32 Hun, 61.)
120. Section 8070—Costs on appeal from a justice's court—when governed by the old Code. (*See Atkins agt. Pitcher*, 31 Hun, 352.)
121. Section 8220—Receiver of an insolvent insurance company—his fees are to be fixed by the court under this section of the Code of Civil Procedure—the rate fixed by section 2 of chapter 278 of 1883 is not applicable where the receiver was entitled to his fees before that act was passed. (*See Matter of Security Life Ins. and Annuity Co.*, 31 Hun, 36.)
122. Section 8299—Costs—where on a trial before a referee the plaintiff recovers a judgment against one of the defendants, the other defendant can only have costs awarded to him upon a motion to the court—Code of Civil Procedure, section 1018. (*See N. Y. Elevated R. R. Co. agt. McDaniel*, 31 Hun, 310.)
123. Section 8247—Where an action is brought in the name of one person at the instigation of and for the direct benefit of another, and the relief asked for is such as to give the latter the fruits of any judgment, the case is within the provision of this section of the Code of Civil Procedure, declaring that "where an action is brought in the name of another by a \* \* \* person who is beneficially interested therein," the latter shall be liable for costs the same "as if he was the plaintiff." (*Slauson agt. Watkins*, 95 N. Y., 369.)
124. Section 8245—Costs—action against a municipal corporation—who is to be deemed its chief fiscal officer. (*See Dressell agt. City of Kingston*, 32 Hun, 526.)
125. Section 8245—Costs—liability of a municipal corporation therefor, in an action commenced in a justice's court—Code of Civil Procedure, section 8347, subdivision 13. (*See Marsh agt. Village of Lansingburgh*, 31 Hun, 514.)
126. Section 8245—Not applicable to costs on appeal. (*See Utica Water-Works Co. agt. City of Utica*, 31 Hun, 426.)
127. Section 8246—Reference of a disputed claim against an estate—the prevailing party is not entitled to his disbursements as a matter of right. (*See Miller agt. Miller*, 32 Hun, 481.)
128. Section 8247—Attachment—it cannot issue in an action brought to enforce a statutory liability—Code of Civil Procedure, section 635. (*See Remington agt. O'Dougherty*, 32 Hun, 255.)
129. Section 8253—Additional allowance in foreclosure cases limited to two and one-half per cent.

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(*See Rosa* agt. *Jenkins*, 31 *Hun*, 384.)

130. Sections 3253, 3254 — Costs and allowances — power of the court to provide for the compensation of a special guardian — additional allowances — when they may be made to each side — restriction as to the amount thereof. (*See Weed* agt. *Paine*, 31 *Hun*, 10.)

131. Section 3287—Attachment—the fees and expenses of the sheriff are to be adjusted by the judge issuing the warrant—they cannot be adjusted by the court—on an application for their adjustment no direction can be given as to the person by whom they shall be paid — Code of Civil Procedure, section 3307, subdivision 2. (*See Hall* agt. *U. S. Reflector Co.*, 31 *Hun*, 609.)

132. Section 3297—Fees of a referee appointed to sell land in an action of partition. (*See Race* agt. *Gilbert*, 32 *Hun*, 360.)

133. Section 3307, subdivision 2—Attachment — the fees and expenses of the sheriff are to be adjusted by the judge issuing the warrant — they cannot be adjusted by the court — on an application for their adjustment no direction can be given as to the person by whom they shall be paid — Code of Civil Procedure, section 3287. (*See Hall* agt. *U. S. Reflector Co.*, 31 *Hun*, 609.)

134. Section 3347, subdivision 13 — Costs — liability of a municipal corporation therefor, in an action commenced in a justice's court — Code of Civil Procedure, section 3245. (*See Marsh* agt. *Village of Lansingburgh*, 31 *Hun*, 514.)

## CODE OF CRIMINAL PROCEDURE.

1. Chapter 4 — Right of the appellate court to pronounce an appro-

priate judgment upon reversing an erroneous one. (*See People* agt. *Bork*, 31 *Hun*, 360.)

2. Section 331 — Communication between the judge and the jury after its retirement — when it does not furnish a ground for setting aside the verdict — how the error, if any, in making such a communication is to be corrected — Code of Criminal Procedure, sections 467, 465, 331. (*See People* agt. *Kelly*, 31 *Hun*, 225.)

3. Section 399 — *It seems* that one who purchases a lottery ticket for the purpose of detecting and punishing the vendor, not with intent to aid in the commission of the offense, is not an accomplice within the meaning of the provision of this section of the Code of Criminal Procedure, declaring that a conviction cannot be had upon the uncorroborated testimony of an accomplice. (*The People* agt. *Noelke et al.*, 94 *N. Y.*, 187.)

4. Section 465 — New trial in criminal cases — when granted on the ground of newly discovered evidence. (*See People* agt. *Lane*, 31 *Hun*, 13.)

5. Sections 465, 467 — Communication between the judge and the jury after its retirement — when it does not furnish a ground for setting aside the verdict — how the error, if any in making such a communication, is to be corrected — Code of Criminal Procedure, sections 467, 465, 331. (*See People* agt. *Kelly*, 31 *Hun*, 225.)

6. Section 467 — A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record. (*The People* agt. *Kelly*, 94 *N. Y.*, 526.)

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7. Sections 469, 527 — Assuming the provisions of the Penal Code, defining forgery in the second degree (*secs.* 511, 512), were applicable, as the Code of Criminal Procedure (*sec.* 469) requires such a question to be raised by motion before or at the time when defendant was called for judgment by failing so to present it the right to object was waived and defendant could not avail himself of it upon appeal.

The power conferred upon the supreme court by the Code of Criminal Procedure (*sec.* 527, as amended by chap. 366, *Laws of 1882*) on appeal in a criminal action, to grant a new trial where the judgment is against evidence or law, or where justice requires it, although no exceptions were taken in the court below, is discretionary, and where it does not appear that the discretion has been abused, the decision of that court is not reviewable here. (*The People* agt. *D'Argencour*, 95 N. Y., 624.)

8. Section 542 — Examination of a defendant in his own behalf — right to cross-examine him to discredit his testimony — when an error in allowing an improper question is cured by the harmlessness of the answer. (*See People* agt. *Irving*, 31 Hun, 614.)

9. Section 873 — The prevailing party in a bastardy case is entitled to taxable costs and no others. And where costs are awarded to plaintiff pursuant to section 873 of the Criminal Code, such costs should be taxed by the clerk. (*Fellows* agt. *Lane*, ante, 435.)

10. Section 899 — *Certiorari* is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under this section of the Code of Criminal Procedure.

Such a proceeding is not a criminal action as defined in that Code, and the justice before whom it is

brought sits as a magistrate and not as a court of special sessions. No appeal is given in such proceedings.

On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him because she was in imminent danger of suffering personal violence at his hands, her case is made out, and it is therefore error on the part of the magistrate to exclude such testimony. (*The People* ex rel. *Sherrer* agt. *Walah*, ante, 482.)

## COMMISSIONERS OF EMIGRATION.

1. Congress has the right to regulate the terms upon which immigrants shall be allowed to enter this country, and have also the power to determine the manner and means by which such protection shall be afforded. (*The People*, &c., ex rel. *McIntyre* agt. *Hurlburt et al.*, ante, 356.)

2. Where the commissioners of emigration (who are the agents of the United States) certify that they have made an examination, and that they have found that the relators are persons unable to take care of themselves without becoming a public charge:

*Held*, that upon this state of facts, the commissioners had a right to say that they should not be permitted to land, and this court, upon *habeas corpus*, cannot interfere with their action. (*Id.*)

3. The commissioners of emigration, by taking the relators from the steamship and into their custody, and permitting them to land for the purpose of making the necessary examination, in order to ascertain whether, under the laws,

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they should be permitted to enter the country, do not lose their jurisdiction. (*Id.*)

4. A decision under one writ of *habeas corpus* refusing to discharge a person restrained of his liberty, does not bar the issuing of a second writ by another court or officer. (*The People, dec., ex rel. McIntyre* agt. *Hurlburt et al.*, ante, 362.)

5. As the rule affords the relator a speedy method of ascertaining the views of the judges who constitute the general term, and secures to him all the benefits of an appeal, a stay of proceedings will not be granted. (*Id.*)

6. It seems doubtful whether the state courts possess jurisdiction to release the relator from the restraint in which he is held, as the commissioners of emigration are to be regarded as officers of the United States in reference to the examination of pauper immigrants. (*Id.*)

7. The practical effect of granting a stay of proceedings in this case would be to enjoin agents of the federal government from exercising functions devolved upon them by a law of the United States relating to a subject-matter clearly within the legislative powers of congress. Even if the state courts have concurrent jurisdiction, the federal tribunals clearly constitute the most appropriate forum within which to test the constitutionality of such legislation. (*Id.*)

## COMMON CARRIERS.

1. In an action against a common carrier for conversion, a clause in a shipping receipt containing the condition that "in no event shall the company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing within thirty days after the date of receipt," is available

to the carrier, and the presentation of claims for loss within the time specified is a condition precedent to the recovery, and unless complied with, the action against the carrier cannot be sustained. (*Hirschberg* agt. *Dinsmore*, ante, 103.)

## COMMON PLEAS.

See APPEAL.

*Macniffes* agt. *Luddington*, ante, 13.

## COMPLAINT.

1. In an action on contract, brought in the New York superior court, by a resident of the city against a foreign corporation, where it does not appear on the face of the complaint that the contract was not made, executed or delivered within this state, nor that the summons was not served on an officer of the defendant within this city as prescribed by law, a demurrer will not be sustained on the ground that the court has not jurisdiction of the person of the defendant or of the subject of the action. (*Fisher* agt. *The Charter Oak Life Insurance Company*, ante, 191.)

2. A demurrer interposed to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action should be sustained, if the facts stated in the complaint do not entitle the plaintiff to the relief specifically demanded therein, even though they would have entitled him to some other or different relief had he demanded it. (*Id.*)

3. A complaint must state facts, from which conclusions are to be drawn not simply conclusions. (*Id.*)

4. Where the complaint alleged the corporation of the defendant under the laws of this state, and that

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on and between certain dates one Edward Hewitt deposited with the defendant, in his own name, the sum of \$718.23; that the sum of \$498.38, on account of said deposit so made, is still in the possession and custody of the defendant; that the plaintiff is, and was at the time above mentioned, the owner of the said money, and it was left for the benefit and in trust for the plaintiff; and that the plaintiff has duly demanded the return of said money, which return the defendant has refused to make. On demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action;

*Held*, that the demurrer should be sustained. The contract was made by and with consent of the plaintiff. It does not appear that the defendant refuses to perform its contract, and until it does so appear there is no cause of action against the defendant. (*Crosby* agt. *Bowery Savings Bank*, ante, 329.)

5. If there be no cause of action stated in the complaint, the defendant is under no obligation to bring in Hewitt, as provided by section 259 of the General Savings Bank act. That section applies to an action brought by the party in whose name the deposit was made when a claim to the deposit is made by another person. (*Id*)

6. Where plaintiff's cause of action is upon a promissory note made by defendant to plaintiff's order, and defendant admits the making of the note, but alleges by way of avoidance that since the making and delivery of said note he made and delivered a certain other note as a renewal of the note sued on, and that the latter note was outstanding and not matured, the plaintiff should have leave by supplemental complaint to allege the fact that the note pleaded in defendant's answer as payment of the note in suit was not paid and

was in plaintiff's possession, and to pray that he may tender the same on the trial. (*Cohn* agt. *Husson*, ante, 461.)

See MECHANICS' LIEN.

*Leiegne* agt. *Schwarzer*, ante, 181.

## CONSTITUTIONAL LAW.

1. On an appeal from an order made by the supreme court denying a motion to vacate certain orders by which the commissioners of estimate and assessment were appointed to carry into effect an act entitled "An act granting to the United States the right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river, through the Harlem kills, and ceding jurisdiction over the same" (*Laws of 1876, chap. 147, as amended by chap. 345 of the Laws of 1879*). The orders were made in the course of proceedings instituted by the United States through petition dated October 8, 1879, addressed to the supreme court of this state, setting forth a desire to acquire certain described lands as necessary for the construction and use of the improvement, and other allegations required by the provisions of the statute relating thereto:

*Held, first*, that while the federal government, as an independent sovereignty, has the power of condemning lands within the states for its own public use, it may lay aside its sovereignty and as a petitioner enter the state courts and there accomplish the same end through proceedings authorized by the state legislature. The state may delegate its power to the United States where the use is public and the convenience is shared by its own citizens. Lands may be taken for the use of the people of the United States, and :

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cannot prejudice the proceedings for that purpose that they are instituted by consent of the legislature of the state in which they lie, and in a way prescribed by it, made to conform to the regulations of its courts.

*Second.* The use for which the land is sought is a public one.

*Third.* The fundamental doctrine is that private property cannot be taken for public purposes without just compensation. But this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. This means reasonable legal certainty. The acts under which these proceedings are justified make such provisions.

*Fourth.* The subject is well expressed in the title of the act of 1876: "The right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and ceding jurisdiction over the same." The act itself is limited to matters which relate to that subject, or which are implied in it and are necessary to make it effectual, the acquisition of lands by purchase or compulsory proceedings, the manner of payment and the mode of acquiring means therefor. All these are incidental to or parts of the principal matter and are material to the accomplishment of the general purpose (*Affirming S. C.*, 66 *How.*, 517). (*Matter of United States*, ante, 121.)

2. Sections 1421 to 1425 of the Code of Civil Procedure, which authorize the substitution of indemnitors to the sheriff as defendants in his place and stead, are not unconstitutional (*Reversing S. C.*, 66 *How.*, 354).

The right of action of the injured party is not thereby taken away or rendered ineffectual, but

its enforcement is simply confined to the actual trespasses.

The right to sue a specific individual is not a constitutional right which cannot be taken away where adequate and complete protection to the right of property is left. (*Hein agt. Davidson*, ante, 148.)

## CONTEMPT.

See ALIMONY.

*Ryer agt. Ryer*, ante, 369.

1. Reference — power of a referee to punish for a contempt — when he may make the order to show cause returnable before the court — duty of the court when the order is so made — Code of Civil Procedure, sections 2260, 2272. (*See Naylor agt. Naylor*, 32 *Hun*, 228.)
2. Senate of the state of New York — power of, to conduct an examination as to the management of departments in the city of New York — when it may compel a witness to appear and testify — power of, to punish for contempt — when it cannot exercise judicial functions — right of a witness before one of its committees to have the advice of counsel. (*See People ex rel. McDonald agt. Keeler*, 32 *Hun*, 563.)

## CORPORATIONS.

1. An annual report of a corporation, signed by two trustees, when the certificate of incorporation of the company was signed by seven and acknowledged by nine trustees, does not satisfy the provisions of the statute which requires such report, to absolve the trustees from personal liability for the debts of the corporation, to be signed by a majority of the trustees, where it is not shown by an official record that more than one of the trustees

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had resigned. (*Westerfield* agt. *Raddo et al.*, ante, 204.)

2. In an action against a corporation, an answer verified by its treasurer denying upon information and belief, each and every allegation of the complaint, except the allegation of the defendant's incorporation is in accordance with the present practice and creates a triable issue of fact, which must be disposed of by a trial in the regular way. (*Macauley* agt. *The Bromell and Barkley Printing Company*, ante, 252.)

**See RECEIVER.**

*United States Trust Co. of New York* agt. *N. Y., W. S. and B. R. R. Co.*, ante, 390.)

**COSTS.**

1. Where a claim against a decedent's estate is materially reduced upon a reference under the statute, thus making it plain that payment thereof has not been unreasonably resisted or neglected, neither costs nor disbursements can be recovered by the claimant under Code of Civil Procedure (secs. 1835, 1836).

The law granting disbursements as a matter of right in cases of this kind is in the Code of Procedure (sec. 317), and section 3246 of the Code of Civil Procedure takes the place of this section of the old Code and does not give disbursements as a matter of right. Disbursements then, like costs, are to be awarded by the court as provided in sections 1835 and 1836, Code of Civil Procedure (*R. S.*, part 2, title 3, chap. 6, sec. 37). They do not belong to the prevailing party in such cases as a matter of right. (*Miller* agt. *Miller*, ante, 135.)

2. The prevailing party, upon a reference of a claim against a decedent, under the unrepealed pro-

visions of the Revised Statutes, is entitled to recover the fees of referee, witnesses and his other disbursements.

By Laws of 1877 (p. 469), all of the Code of Procedure is repealed, except certain specified sections, among which are sections 311 to 322, both inclusive, and the repealing act of 1880 (*Laws of 1880*, p. 875, sub. 8) provides, that the repeal by that act shall not affect the right of the prevailing party to recover the fees of referee, witnesses and his other disbursements, upon the reference of a claim against a decedent, under the unrepealed provisions of the Revised Statutes (*This is adverse to Daggett* agt. *Mead*, 11 Abb. N. C., 116; see, also, *Miller* agt. *Miller*, ante, 135). (*Hall* agt. *Edmunds*, ante, 202.)

3. The prevailing party in a bastardy case is entitled to taxable costs and no others. And where costs are awarded to plaintiff pursuant to section 878 of the Criminal Code, such costs should be taxed by the clerk. (*Fellows* agt. *Lane*, ante, 435.)

4. Where a claim was presented to J., an attorney of an executor, and was disputed and an offer was made to refer the same under the statute, and afterwards plaintiff's attorneys served upon J. a written notice directed to him as attorney for the executor renewing plaintiff's offer to refer and to appear before the surrogate at such reasonable time as he, J., should name to have the reference heard upon and perfected, concluding as follows: "And you will also take notice that your omission to appoint a time for a meeting before the surrogate will be regarded as a refusal to refer." And in response to such notice the plaintiff's attorneys were served with a written notice from J. stating, in substance, that the alleged claim had been withdrawn by the person who presented it and that

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there was "no subject matter for a reference and no occasion for the choice of a referee:"

*Held*, that this amounted to a refusal to refer and is sufficient to entitle plaintiff to costs, &c., unless the withdrawal of the claim as alleged would prevent. But the defendants having alleged such withdrawal should establish it affirmatively.

The plaintiff's attorneys having pressed their claim continually, and defendants having had every opportunity to refer before the commencement of the action, they not having taken steps to secure a proposed reference, the plaintiff having succeeded is entitled to recover his taxable costs and disbursements. (*Wilkinson* agt. *Littlewood*, ante, 474.)

5. The plaintiff alleged in the first count of her complaint that the defendant had wrongfully entered into the possession of certain premises, an undivided one-seventh interest in which was owned by the plaintiff's assignor, and sought to recover the rental value and *mesne* profits thereof. In the second count she alleged the wrongful entry of the defendant and the recovery of a judgment in an action of ejectment brought against him by the plaintiff's assignor, and sought to recover the same rental value and *mesne* profits. The defendant's answer contained a general denial, an averment of ownership in himself and his grantors, and a claim to be allowed for permanent improvements made while holding under color of title adversely to the plaintiff's assignor. Upon the trial, by the court without a jury, a judgment for twenty-two dollars and twenty-eight cents was ordered for the plaintiff and costs were awarded to the defendant: *Held*, that a question as to the title to real estate was involved in the issues raised by the answer and that as the plaintiff had succeeded, she was entitled to recover costs. (*Broadway* agt. *Scott*, 31 *Hun*, 378.)

6. That, as the plaintiff's right to the costs was governed by the statute, the award of costs made by the trial judge was not final and conclusive upon the parties, and that the court at special term had power to set aside the judgment for costs entered in the defendant's favor. (*Id.*)

7. In November, 1882, the defendant moved to have the plaintiff's proceedings stayed because of the non-payment by the plaintiff of certain costs, which had been awarded to the defendant upon the reversal of an order for his arrest. This motion for a stay was denied, and the order denying it was affirmed at the general term, but reversed by the court of appeals on April 24, 1883. On April 5, 1883, the action was tried and a verdict rendered and costs taxed in favor of the plaintiff. Upon the plaintiff's motion an order was made setting off the costs awarded to the defendant on his appeal to the court of appeals against an equal amount of the general costs awarded to the plaintiff: *Held*, that the costs of the successful appeal legally belonged, without any assignment, to the defendant's attorney; that they could not be so set off against the general costs awarded to the plaintiff, and that the order so directing should be reversed. (*Tunstall* agt. *Winton*, 31 *Hun*, 319.)

8. An action, brought against a railroad company, was successfully defended by an attorney employed by it and a judgment for the costs was entered in its favor. A receiver of the company, appointed in proceedings supplementary to execution during the pendency of the said action, collected the amount of the judgment for costs: *Held*, that he was properly required to pay the same over to the attorney who defended the action. (*Matter of Bailey*, 31 *Hun*, 608.)

9. The discretion exercised by a

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calendar. These costs were paid, the answer amended, and thereafter a verdict rendered in favor of the defendant which entitled him to costs: *Held*, that he could not include in his costs, the costs already paid to the plaintiff in pursuance of the said order. (*Seneca Nation of Indians* agt. *Hawley*, 82 Hun, 288.)

20. Where a disputed claim against the estate of a deceased person is referred and a report in the claimant's favor is confirmed, the claimant is not entitled, as a matter of right, to the disbursements necessarily made by him, but they, as well as the costs, are to be awarded or withheld by the court in its discretion. (*Miller* agt. *Miller*, 32 Hun, 481.)

21. Judgment of divorce—petition to have it vacated because of fraud—when the petitioner shows no right to intervene—power of the court to impose upon him the payment of the costs. (*See Simmons* agt. *Simmons*, 32 Hun, 551.)

22. Justices' court—entry of a judgment for too large an amount—power of the successful party to remit a part of it—costs of an appeal to the county court. (*See Allen* agt. *Swan*, 32 Hun, 863.)

23. The general term has no power on appeal by a railroad company from one order of confirmation of the report of commissioners appointed in proceedings to acquire title to lands, to award costs to owners. (*In re N. Y., W. S. and B. R. Co.*, 94 N. Y., 287.)

24. Of unsuccessful appeal by testamentary trustee from decree of surrogate in proceeding to compel him to account may be imposed upon him individually. (*See In re McCarter*, 94 N. Y., 558.)

25. Where an action is brought in the name of one person at the instigation of and for the direct benefit of

another, and the relief asked for is such as to give the latter the fruits of any judgment, the case is within the provision of the Code of Civil Procedure (sec. 3247), declaring that "where an action is brought in the name of another by a \* \* \* person who is beneficially interested therein," the latter shall be liable for costs the same "as if he was the plaintiff." (*Slauson* agt. *Watkins*, 95 N. Y., 869.)

## COUNTER-CLAIM.

1. The complaint alleged that on a certain date defendant, by means of fraudulent representations, obtained money from plaintiff and gave him an instrument in writing, which was set forth, and continued in the ordinary form of a complaint in an action for fraud. Defendant pleaded as a defense that plaintiff, at about the time alleged in the complaint, agreed to carry on business with defendant and furnish the latter with \$2,000 working capital, and in consideration thereof defendant agreed to become responsible for the amount stated in the complaint, and executed a paper similar to the one pleaded by plaintiff; that plaintiff had failed to furnish the amount aforesaid and perform his contract. In a separate defense defendant pleaded the same matter by way of counter-claim and demanded affirmative relief. Plaintiff demurred to the defense as insufficient in law upon the face thereof, and to the counter-claim as insufficient in law upon the face thereof, and upon the further ground that it did not state facts sufficient to constitute a cause of action:

*Held*, that the demurrer to the counter-claim should be overruled, but as to the defense it should be upheld. (*Safford* agt. *Snedeker*, ante, 264.)

2. A demurrer to a counter-claim must specify the objections to the

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counter-claim, otherwise it may be disregarded. (*Id.*)

## CREDITOR'S SUIT.

1. An execution against property must be issued before a creditor's suit can be maintained, and the fact that the debtor himself may be deceased forms no legal excuse for the omission to issue the execution. (*Lichtenberg agt. Herdtfelder et al., ante, 196.*)

## CRIMINAL LAW.

1. The relator, by his counsel, sued out a writ of *habeas corpus* before the recorder of the city of Albany, alleging as a reason for his discharge that the mandate in the hands of the superintendent of the penitentiary was not a copy of the record of conviction. The return of the defendant sets forth that the relator was detained in the penitentiary by virtue of a warrant, a copy of which was attached to the return, "and, also, by virtue of the judgment of conviction, for the crime of assault in the third degree, by the recorder of the city of Binghamton, in having, on the 8th day of May, 1883, at the city of Binghamton, beaten, struck and assaulted one A. Levine." The return of the defendant was not traversed:

*Held, first*, that upon the return to the writ having been made, the court is to examine into the facts alleged in the return. If there is no traverse of those facts they must be taken as true.

*Held, second*, that the record showed a conviction for a crime by a competent court, and shows that the court had jurisdiction of the person and of the offense charged, and the imposition of a sentence which it had jurisdiction to impose.

*Held, third*, that if the court had jurisdiction of the person and of

the offense, no insufficiency of the record in point of form will justify the discharge of the prisoner. (*The People ex rel. Evans agt. McEwen, ante, 105.*)

2. It is not the mittimus that holds the prisoner in custody, but the judgment of the court. A prisoner who has been properly and legally sentenced to prison cannot be released, simply because there is an imperfection in what is commonly called the mittimus. (*Id.*)
3. After a plea of guilty, there is nothing further for a court to do than to pronounce sentence. The plea of guilty is like the verdict of guilty. There is no duty in the court "to convict," but only to sentence. When defendant pleads guilty it is not necessary that there should be any conviction. (*Id.*)
4. *People ex rel. agt. Barber* (89 N. Y., 460), which came up from a court of record, *held* to be applicable to conviction in special sessions. (*Id.*)

## DEED OF TRUST.

1. The plaintiff sued to set aside a deed of trust to her brother-in-law of property which came to her through her mother's will. The day succeeding the mother's funeral her will was opened and accompanying it was found a letter, written ten years before, requesting plaintiff to put her share of the property in trust, and a form of deed was inclosed. The plaintiff then consented to sign the deed, which was executed a few days after, whereby she made an irrevocable settlement of her property, reserving the power of appointment, by last will and testament, in favor of those related to her by consanguinity, and in default of such appointment the trustee was to convey the estate to her children or descendants, and in case she

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should leave no child or descendant, the estate was to go by force of the deed to her heirs-at-law and next of kin. The plaintiff at the time of executing the instrument was in feeble health, and did not know the amount or condition of her property, and testified that she did not understand that she was making an irrevocable disposition of it. The trustee, under whose eye and with whose active co-operation the settlement was made and executed, and whose family was benefited by its terms and limitations, asked her and her sister "if they did not wish to follow the wishes of their parents, who were dead:"

*Held*, that plaintiff should be relieved from the settlement, and the deed of trust should be set aside. (*Gibbes* agt. *The New York Life Insurance and Trust Company*, ante, 207.)

## DEMURRER.

1. The complaint alleged that on a certain date defendant, by means of fraudulent representations, obtained money from plaintiff and gave him an instrument in writing, which was set forth, and continued in the ordinary form of a complaint in an action for fraud. Defendant pleaded as a defense that plaintiff, at about the time alleged in the complaint, agreed to carry on business with defendant and furnish the latter with \$2,000 working capital, and in consideration thereof defendant agreed to become responsible for the amount stated in the complaint, and executed a paper similar to the one pleaded by plaintiff; that plaintiff had failed to furnish the amount aforesaid and perform his contract. In a separate defense defendant pleaded the same matter by way of counter-claim and demanded affirmative relief. Plaintiff demurred to the defense as insufficient in law upon the face thereof, and to the counter-claim

as insufficient in law upon the face thereof, and upon the further ground that it did not state facts sufficient to constitute a cause of action:

*Held*, that the demurrer to the counter-claim should be overruled, but as to the defense it should be upheld. (*Safford* agt. *Snedeker*, ante, 264.)

2. A demurrer to a counter-claim must specify the objections to the counter-claim, otherwise it may be disregarded. (*Id.*)

## DISTRICT COURTS.

1. Where, in action in a district court upon contract, an order of arrest has been granted upon facts (shown by affidavits) extrinsic to the cause of action, and such order of arrest has not been vacated, the plaintiff need only prove on the trial his money demand, and is then entitled to a judgment subjecting the defendant to execution against his person. (*Stern* agt. *Moss*, ante, 199.)
2. Although it seems there is no doubt that the court of common pleas may of its own motion, order an amended or supplemental return, nor is there any doubt that a justice of the district court may himself apply for leave to amend or to supplement his return, yet it is the safe practice to require the justice to so apply before he alters or adds to his first return. (*Zabriskie* agt. *Wilder*, ante, 311.)

## DIVORCE.

1. The residence of a man is changed from one place to another only by an abandonment of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention to permanently settle in that place.

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Where it appeared from defendant's own testimony that, during all the time of his sojourn in Dresden, whenever he has had occasion to state his residence he has described himself as a resident of the city of New York; that he has every year paid the stranger's tax in the city of Dresden; that all the property he expects to inherit is situated in the city of New York:

*Held*, that from his own evidence he has never had any intention of obtaining a residence anywhere else than in the city of his birth, and was consequently a resident of the state of New York at the time of the commencement of this action.

Cruel and inhuman treatment which will authorize a separation, or which will permit a wife to say that it is unsafe or improper for her to cohabit with her husband, must be either actual personal violence, committed with danger to life, limb or health, or there must be a reasonable apprehension of personal violence, arising from menaces or threats creating a reasonable fear of bodily harm; mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty.

While the treatment of the plaintiff by the defendant was frequently unkind, while he frequently indulged in fits of passion and used violent language, and by his conduct, supervision and attempts to control her every action, made himself, at times, very disagreeable to her, and frequently caused her great unhappiness; while he was severe, harsh and even ungentlemanly, yet his conduct was not such as to create any apprehension of personal violence, or to cause injury to the health of the plaintiff, and for that reason she is not entitled to a decree for a separation.

That defendant made an un-

founded charge of adultery against plaintiff while she was living separate from him, and which only came to her notice indirectly, is not such an act of cruelty as to warrant a separation. Nor does the making of a charge of adultery, even to one's wife, constitute cruelty, unless such charge be made in bad faith, and without any ground for believing it to be true.

Where in an action brought by the wife against her husband to obtain a separation from him, and he sets up a counter-claim and alleges that his wife was guilty of adultery, and such allegation was made as a foundation for a claim for a demand for affirmative relief, and not simply as a defense to plaintiff's action:

*Held*, that this was tantamount to the commencement of an action by him against his wife for divorce on the ground of adultery, and as to that counter-claim she has the same right as though she were defendant in an action brought against her for an absolute divorce, and although her complaint be dismissed, yet where she succeeds in refuting the charge of adultery, she is entitled to an allowance for her counsel fees and expenses of preparing for trial *pendente lite*. (*De Meli* agt. *De Meli*, ante, 20.)

2. The plaintiff having brought this action for a limited divorce from defendant, the latter set up a divorce obtained by him from her in Massachusetts:

*Held*, that the record of the Massachusetts court is binding upon the plaintiff as it shows all the facts necessary to give that court jurisdiction both of the subject matter and of the parties. (*Johnson* agt. *Johnson*, ante, 141.)

3. The provisions of the Code of Civil Procedure for fine and imprisonment of a husband in default for non-payment of alimony do not interfere with or restrict

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the power of the court to strike out the answer of a disobedient defendant in a divorce suit. (*Brisbane* agt. *Brisbane*, ante, 184.)

## EASEMENT.

1. The legislature has no power to permit, by the erection of poles for the support of electric wires in front of a person's premises, the taking of such person's property by impairing the use and enjoyment of the light, air and free access to his premises, which forms part of his easement in the public street, without having provided for the payment to such person of due compensation therefor. (*Tiffany et al.*, agt. *United States Illuminating Company*, ante, 73)
2. Whether the erection of the poles would have been a substantial impairment of the use of such easement is a question of fact. (*Id.*)

## ELEVATED RAILROADS:

1. Chapter 478 of the Laws of 1867, which authorized the defendants to construct an elevated railroad along both sides of Greenwich street, and on Ninth avenue, or on streets west of Ninth avenue, does not empower defendants to place stair-cases or to build stations in or over the streets that intersect the line of the railroad:  
*Held*, that the depot in question in Warren street was erected and is now maintained without the authority of law and is a purpresture.  
*Held*, further, that the plaintiff falls within that class of sufferers whose injuries are such as to give them individually a right to demand the protection of the court, and his right to an injunction is clear.  
The plaintiff by maintaining a wooden awning over the sidewalk does not deprive himself of his

right to complain of an unlawful structure that darkens his windows and renders his store unfit for the transaction of his ordinary business.

Nor is the plaintiff guilty of such laches as to disentitle him to an injunction. (*Mattlage* agt. *N. Y. Elevated Railway Co.* and *Manhattan Railway Co.*, ante, 282.)

## ESCAPE.

*See* BAIL.

*People ex rel. Tully* agt. *Davidson*, ante, 417.

## EVIDENCE.

1. Conversations between plaintiff and a deceased partner are inadmissible as evidence against the surviving partner. (*Farley* agt. *Norton*, ante, 438.)
2. On a trial for arson in the third degree, two accomplices swore that defendant was to and did purchase cheap horses to be exchanged for more valuable ones before the fire. Several witnesses testified to selling cheap horses to defendant, and one S. swore to the exchange of horses being made. The court refused to charge that there was no evidence to corroborate the accomplices:  
*Held*, no error. The rule now embodied in the statute (*sec. 599, Code Crim. Proc.*), is substantially the rule which, before the statute, courts were in the habit of stating to the jury for their guidance, but neither the doctrine hitherto declared by courts nor the rule embodied in the statute, requires that the whole case should be proved outside of the testimony of the accomplice. (*The People* agt. *Hooghkirk*, ante, 256.)
3. Evidence of the defendant on cross-examination in such cases with reference to his connection

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with other fires and with insurance on other property burned, is admissible in the discretion of the court as affecting his credibility. (*Id.*)

## EXAMINATION OF PARTIES.

1. A plaintiff in an action has the right, under the Code of Civil Procedure, to an order for the examination of one of two defendants, to prove a copartnership between the defendants. (*Goldberg* agt. *Roberts*, ante, 269.)
2. In an action to recover the possession of personal property, the defendants, though charged with fraud, may nevertheless be examined before trial, where the object is to ascertain the quantity of goods that came into their hands, the time the goods were received, the time of their transfer to another party, &c., and if questions are put which defendants claim that they are not bound to answer, on the ground that they may criminate themselves, they may assert the privilege, and it is for the judge to determine whether the questions should be answered. (*Davenport Glucose Company* agt. *Taussig et al.*, ante, 499.)

## EXECUTION.

1. An injunction order of the United States court staying the sheriff's proceedings operates to extend the time in which he is bound to make return of the execution by as many days as he was under stay. (*Ansonia Brass and Copper Company* agt. *Conner*, ante, 157.)
2. Form of, when issued upon a judgment recovered in an action against an absconding debtor served by publication—Code of Civil Procedure, sections 438, 1370. (*See Place* agt. *Riley*, 32 *Hun*, 17.)
3. Sale under execution—redemption by another judgment creditor—the whole amount of the first bid must be paid. (*See Youmans* agt. *Terry*, 32 *Hun*, 624.)
4. Sale under an execution—action against a sheriff to recover the amount due upon a junior execution which is in the sheriff's hands—the sheriff cannot claim to withhold the amount due upon such junior executions, because earlier executions have been theretofore issued to him, where such earlier executions have been returned by him as unsatisfied. (*See Satter* agt. *Bowe*, 32 *Hun*, 236.)
5. Sheriff's fees on a levy and sale—when the plaintiff may compel a taxation of them. (*See Mallory* agt. *Reichert*, 32 *Hun*, 86.)
6. Supplementary proceedings—they need not be instituted in the judicial district in which the action was tried. (*See Jacobson* agt. *Doty Plaster Mfg. Co.*, 32 *Hun*, 436.)
7. An execution, although it be so defective that it is subject to be vacated and set aside on motion, may not be treated as void when questioned in collateral proceedings, where the defects are amendable, or where all the essential facts necessary for the direction and protection of the sheriff are stated in the execution, or are plainly inferable from the facts stated. (*Wright* agt. *Nostrand*, 94 *N. Y.*, 81.)
8. Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to

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permit a redemption. (*Weed* agt. *Weed*, 94 N. Y., 243.)

9. *It seems*, that the issuing of an execution against the person of a judgment debtor is within the scope of the implied authority of the attorney for the judgment creditor; and when such an execution is issued and the debtor arrested thereon in a case where it is not authorized, the client may be held liable, although there be no evidence that he directed either the issuing of the execution or the arrest. (*Guilleaume* agt. *Rowe*, 94 N. Y., 268.)

10. Under the Revised Statutes (2 R. S., 645, sec. 38) the death of a judgment debtor while in custody under a body execution does not entitle the sheriff to poundage. (*Flack* agt. *State*, 95 N. Y., 461.)

11. *It seems*, that to entitle him thereto, he must show either a collection of the moneys called for interference by the judgment creditor with his execution of the process, or the discharge of the judgment debtor under the provisions of the act for the relief of imprisoned debtors; the arrest of the debtor is in no just sense the equivalent of a collection. (*Id.*)

12. The history of the legislation upon the subject given and the authorities collated and discussed. (*Id.*)

## EXECUTORS AND ADMINISTRATORS.

1. It is provided by the Revised Statutes (*part 2, chap. 6, title 3, art. 3, sec. 58* [*3 Bank's 7th ed.*, 2303]), that "on the settlement of the account" of an executor or administrator he shall be allowed for his services certain commissions. (*Estate of Meyer*, ante, 170.)

2. Such officer is chargeable with interest on sums appropriated by

him in payment of commissions in advance of their allowance by the surrogate. (*Id.*)

3. Where an administrator, in January, 1878, deposited to his own credit in a bank certain moneys belonging to the estate, where they were mingled with his own funds:

*Held*, that if the withdrawal of such moneys by the administrator and his deposit of that sum to his private account is to be deemed an appropriation by him of his commissions, he should be held accountable for interest thereon. (*Id.*)

4. And if he is not to be regarded as having practically transferred these funds to himself under a claim of right, but rather as having held them as estate funds to be accounted for, then he is chargeable with interest for having failed, since January, 1878, to make such use of them as would result in some advantage to the estate (*Id.*)

5. The statute prescribing the qualifications of administrators (*sec. 82, tit. 2, chap. 6, part 2, R. S.*, [*3 Banks, 7th ed.*], 2291) forbids the issuance of letters to "a person convicted of an infamous crime:"

*Held*, that this prohibition extends only to persons convicted within the state of New York. (*In the Estate of Julia O'Brien, deceased*, ante, 503.)

6. The same statute provides that "no letters of administration shall be granted \* \* \* to any person who shall be judged incompetent by the surrogate to execute the duties of such trust by reason of improvidence:"

*Held*, that a conviction for larceny in a foreign jurisdiction is no evidence that the person convicted is "incompetent by reason of improvidence." (*Id.*)

## See TAXES AND ASSESSMENTS.

*Matter of McMahon*, ante, 113.

*Matter of McMahon*, ante, 152.

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*See* COSTS.

*Miller* agt. *Miller et al.*, ante, 135.  
*Hall* agt. *Edmunds*, ante, 202.  
*Wilkinson* agt. *Littlewood*, ante, 474.

*See* SURROGATES.

*Matter of Tilden*, ante, 447.

*See* WILL.

*In the Estate of John R. Marshall*, deceased, ante, 519.

## HABEAS CORPUS.

*See* CRIMINAL LAW.

*The People ex rel. Evans* agt. *McEwen*, ante, 105.

## HARBOR-MASTERS.

1. The act of 1862 (*chap.* 487) in regard to the harbor-masters is general in its character, and is not limited to cases where other vessels require to be immediately accommodated in receiving or discharging cargoes. They have power to act summarily, and their duty in this respect may be considered a necessary police regulation. The statute contemplates prompt and decisive action. (*Cole* agt. *Mahoney*, ante, 226.)

## HARLEM WIDENING.

*See* CONSTITUTIONAL LAW.

*Matter of United States*, ante, 121.

## HUSBAND AND WIFE.

1. Business partnerships between husband and wife are not authorized by the statutes of the state of New York, and contracts in the conduct of such business are not enforceable against the wife. (*Fairlee* agt. *Bloomington*, ante, 292.)
2. Any declaration of the wife that she sustains the relation to her husband of a partner in business is not binding upon her. (*Id.*)

8. The case of *Zimmerman* agt. *Erhard and Dodge* (58 *How.*, 11) criticised and not followed. (*Id.*)

## INJUNCTION.

*See* ELEVATED RAILROAD.

*Mattlage* agt. *N. Y. Elevated Railway Co. and Manhattan Railway Co.*, ante, 233.

1. Upon the defendant's motion the court vacated a temporary injunction, granted in this action, which restrained the defendant from constructing its road over a portion of a street in a village the fee of which was vested in the plaintiff, who was the owner of the adjoining house and lot. The defendant did not deny the wrongfulness of its act, but tendered an undertaking "conditioned to pay to the plaintiff all damages that he may sustain by reason of the construction and operation of the defendant's road upon the premises described in the complaint." *Held*, that as the defendant did not attempt to justify its acts it could only procure a dissolution of the injunction by a strict compliance with the provisions of section 629 of the Code of Civil Procedure, as amended by chapter 404 of 1883, (*Chamberlain* agt. *Buffalo, N. Y. and P. R. R. Co.*, 81 *Hun*, 339.)
2. That the undertaking furnished did not comply with that section which required the undertaking to be "conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order."  
 That the court erred in dissolving the temporary injunction. (*Id.*)

## JUDGMENT.

1. The relator presented to the defendant, the county clerk of New York, an instrument which he

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claimed to be a transcript of a judgment recovered in the city court of Brooklyn and sought to have the same docketed by the defendant. The instrument set forth the name of the party against whom, and the name of the party in whose favor, the judgment had been recovered, the amount of the judgment and the time of its filing, together with the name of the attorney. At the end of it was the following certificate: "Office of the Clerk of the City Court of Brooklyn, ss.: I do hereby certify that the foregoing contains all the facts necessary to make a perfect docket of the judgment rendered in the City Court of Brooklyn in the above cause. Dated Brooklyn, N. Y., January 12, 1884. C. W. THOMAS, Clerk." *Held*, that the defendant properly refused to docket the judgment, as the instrument purporting to be a transcript thereof was not "attested" by the clerk of the city court as required by section 1247 of the Code of Civil Procedure. (*People ex rel. Crittenden* agt. *Keenan*, 31 *Hun*, 625.)

2. An action brought upon a judgment, recovered against the defendants in a justice's court, was defended upon the ground, among others, that the defendants allowed it to be recovered upon the faith of the plaintiff's promise that they should not be held liable thereon. It appeared that the summons was personally served upon the defendants; that a complaint and answer were filed, and that the defendants were personally present in the court when the plaintiff's witnesses were examined: *Held*, that the plaintiff's previous promise that the judgment should not be used against the defendants was no defense to its enforcement. (*Green* agt. *Hallenbeck*, 32 *Hun*, 469.)
3. The defendants claimed that at the time of the recovery of the judgment they were told by the

plaintiff that they, the defendants, were secured from all loss by a bond of indemnity given in another action, and a judgment confessed in their favor by other persons: *Held*, that as the plaintiff was not acting as the counsel or adviser of the defendants in the action, and as the defendants were as well aware of the contents of the bond of indemnity and judgment as was the plaintiff, there was no false statement on the part of the plaintiff which prevented him from enforcing his judgment. (*Id.*)

4. Of divorce—petition to have it vacated because of fraud—when the petitioner shows no right to intervene—power of the court to impose upon him the payment of costs. (*See Simmons* agt. *Simmons*, 32 *Hun*, 551.)
5. Judgment against a receiver—liability of one purchasing the property from the receiver subject to all his liabilities—when the creditor may enforce his claim against the property in the hands of the purchaser. (*See Schmidt* agt. *N. Y., L. E. and W. R. R. Co.*, 32 *Hun*, 355.)
6. Trustee of a company—right of, to purchase judgments against it—they may be enforced for their full amount although purchased at a discount. (*See Inglehart* agt. *Thousand Island Hotel Co.*, 32 *Hun*, 377.)
7. Justice's court—entry of a judgment for too large an amount—power of the successful party to remit a part of it. (*See Allen* agt. *Swan*, 32 *Hun*, 363.)
8. A judgment against an executor is not a lien upon the real estate of the deceased. (*See Hibbard* agt. *Dayton*, 32 *Hun*, 220.)
9. To operate as a bar it must be pleaded as such. (*See Henderson* agt. *Scott*, 32 *Hun*, 412.)

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10. When set aside as having been procured through fraud. (*See Mather agt. Parsons, 82 Hun, 838.*)

## JUDICIAL SALE.

1. Sale under execution — redemption by another judgment creditor — the whole amount of the first bid must be paid. (*See Youmans agt. Terry, 82 Hun, 624.*)
2. Mortgage — what is a sufficient description of the land mortgaged to enable the purchaser at a foreclosure sale to recover the same in ejectment — when a general description is sufficient. (*See Durant agt. Kenyon, 82 Hun, 634.*)
3. Under statutory foreclosure — the personal representatives of a deceased mortgagor must be served with notice. (*See Van Schaack agt. Saunders, 82 Hun, 515.*)

## JURY.

1. The jury was instructed by the court in its charge to pass upon four questions of fact, and that if they decided all of those questions in favor of the plaintiff their verdict should be for him, but that if they decided in favor of the defendant upon any one of those questions their verdict should be for the defendant. After being out for several hours the jury came into court and stated that they were unable to agree, whereupon they were told by the presiding justice in open court that he did not feel warranted in discharging them until they had given the case further consideration. Upon being asked by one of the jurors to repeat the four propositions which they were to pass upon, the justice outlined them, as he had previously stated them in the charge, and said, "if you find for the plaintiff you must

find on each one of these questions in favor of the plaintiff." Neither party was present in person or by counsel, the defendant's counsel having left the city:

*Held*, that it was not an error for which a new trial should be granted for the judge to thus instruct the jury in open court, but in the absence of counsel whose attendance could not have been secured before morning. An expression to a jury, by an officer in charge, of an opinion that unless they agreed they would be detained until the next day at noon, although improper, is not such an irregularity as should avoid the verdict. It does not amount to an illegal restraint.

While the affidavits of jurors will not be received to show their own misconduct, or that of their fellows, they are probably admissible to show the misconduct of the officer having them in charge, but not to show its effect upon their own minds. Jurors should not be permitted to stultify or criminate themselves by swearing that they sacrificed their convictions in order to be relieved from a temporary inconvenience. (*Wiggins agt. Downer, ante, 65.*)

2. The right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted no longer exists; he can raise no objection except to individual jurors under section 239 of the Code of Criminal Procedure. (*The People agt. Hooghkirk, ante, 256.*)

## LANDLORD AND TENANT.

1. In a suit for rent claimed to be due from a tenant of a suite of rooms in an apartment house, it appeared that defendant's wife and servants were taken sick by inhaling a malarial or poisonous gas in the apartments occupied by them; that this unhealthy con-

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dition of the apartment was owing to the defective condition of the general plumbing work of the house, of which the landlord was notified by orders he receive from the board of health, requiring him to have changes made in the plumbing work, and which unhealthy condition could have been removed if he had complied with those orders; that the defendant waited for two weeks, and, finding that nothing was done on the part of the landlord, left, under the apprehension that he was imperiling the health of himself and family by remaining:

*Held*, that this state of facts established a constructive eviction, and prevention of the free enjoyment of the apartments, so as to relieve the defendant from paying rent for them. (*Bradley agt. Goicouria, ante, 76.*)

2. The city leased to the defendants, for wharfage purposes, the south side of pier No. 51, North river, for a term of years, ending in 1875, the rent payable quarterly, on the first days of August, November, February and May. There was a proviso in the lease that the lessors might at any time "set apart for their use any or all of such wharves as they may require," the right to the part of the premises so required to vest in the city for all purposes, on notice being given to the lessees by the comptroller, the rent thereafter to be equitably reduced proportionate to the part of the premises not taken. On the 9th of October, 1873, notice was served requiring the whole of the premises, and the city took possession. In this action to recover the proportionate amount of rent accruing between August first and October ninth:

*Held*, that there can be no recovery, because, in the absence of a statute, or an express agreement to that effect, rent cannot be apportioned in respect to time. The act of 1875, providing for an ap-

portionment of rents, has no application to leases executed before that date. (*The Mayor, &c., agt. Ketchum et al., ante, 161.*)

## LIBEL.

1. In an action of libel brought by plaintiff, the publisher of a newspaper in the city of New York called "Truth," against defendant, who was a regular correspondent of the "Cincinnati Enquirer." The complaint was that he, defendant, wrote and published concerning him and the newspaper the following matter: "The newspaper 'Truth' is alleged to have been started for the purposes of plunder:"

*Held, first*, that the matter is in itself defamatory, and unless its publication was justified it is actionable.

*Second*. The motive which inspired the foundation of a newspaper can be well shown by its own columns as they speak from day to day.

*Third*. The official conduct of men in public life, and the fitness and claims of candidates for official station, are fair subjects for review and criticism in the public prints, and such honest criticism, although it be unfriendly and severe, can give no occasion for the suggestion that it proceeds from unworthy or indirect motives. An independent press may feel constrained under a sense of duty to discuss such matters at times with honest plainness, but assaults upon private persons and character are not shielded by the rule which allows publishers of newspapers to review, criticise and energetically oppose the public action of men in official station, or those who are seeking it.

*Fourth*. If the words published by the defendant are true under the evidence then the defendant's justification is established, otherwise not.

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*Fifth.* If the work of this defendant in preparing and publishing this communication, including the matter complained of, was in good faith done, and in the honest belief that it was true in statement and comment, and without any indirect motive to injure the plaintiff or the newspaper in question, or ill-will toward him or it (and of this the jury are the judges), then it falls within the class of cases qualifiedly privileged and the defendant is entitled to the immunity from liability which such privilege confers, although the matter complained of be not true.

But this privilege accorded to journalists and regular correspondents of the press, in writing and commenting upon current public affairs and matters, is not to be abused by using it intemperately or recklessly as an instrument to injure individuals or substantial interests, through statements or inferences maliciously made, justified neither by the facts nor the occasion.

Every defamatory article in itself contains evidence of malice. Such malice the law implies, and that without any extrinsic proof; but where the conclusion is reached that the communication was qualifiedly privileged on account of the subject, the occasion and the duty, then proof of actual malice is required in order to justify a verdict.

The amount of damages in actions of this character is within the control of the jury under all the facts and circumstances as detailed by the evidence. But when the action is not by the proprietors of a newspaper itself for injury to it, but by a plaintiff who claims to have been the starter, or one of the starters, of the paper, and one of the owners and publishers thereof, and that he has sustained damages by the publication of the article complained of, the damages sustained by the paper itself as such cannot be recovered by

him, but only such as he has personally sustained by reason of his connection with the paper in the relations above mentioned. (*Hart* agt. *Townsend*, ante, 88.)

## MASTER AND SERVANT.

1. If the servant, within the scope of his duty, enables another by his assent to injure a third person, the master is liable, but when there is no evidence of such assent there is no cause of action against the master. Assent in such case will not ordinarily be inferred. (*Edwards* agt. *Jones*, ante, 177.)

## MECHANIC'S LIEN.

1. An error in the name of the owner in the notice of claim in a mechanic's lien proceeding can be corrected in the complaint by setting forth the mistake and averring the true owner. (*Leigne* agt. *Schwarzler*, ante, 131.)
2. The complaint must allege that there is something due by the owner to the contractor under the contract, when the action was brought to enforce the lien, but an amendment may be made in this respect. (*Id.*)
3. In an action to foreclose a mechanic's lien, where there has been an abandonment of the contract by defendant, it is not necessary for plaintiff in order to recover upon a *quantum meruit* to show legal excuse for not fully performing the contract, nor, where the time fixed by the contract for its performance has been waived, to notify the defendant of his intention and demand performance upon his part within a reasonable time. (*Powers* agt. *Hogan*, ante, 255.)
4. The amendments to the me-

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chanics' lien law, extending its provisions to the erection of school-houses, embraces all contracts, whether they are with incorporated cities or not, provided the work was done or the materials furnished upon land the title to which was, at the time of the making of the contract and the passage of the act in any city, and a notice of claim which is filed with the head of the board of education, or of the school trustees of a ward, is a compliance with the requirement that it be filed with "the head of the department or bureau having the work in charge." (*Bell* agt. *Vanderbilt*, ante, 332.)

## MOTIONS AND ORDERS.

1. Upon the fourteenth day of December the plaintiff entered up a judgment against the defendant by default. The roll shows that the summons was served by one R. The defendant denied that he had been so served and made a motion to set aside the judgment for that reason. The affidavits were conflicting, and on a reference to take proof the referee reported that there had been no service of the summons. The special term denied the motion with leave to renew. The motion was renewed upon an affidavit which impeached the plaintiff's character, and upon the same papers which had been the basis of the former motion:

*Held*, that the statements in regard to plaintiff's character in defendant's additional affidavit were new and additional facts not considered in the former motion and entitled him to renew his motion to set aside the judgment. (*Apsley* agt. *Wood*, ante, 406.)

2. December 14, 1877, W. J. Best was appointed the receiver of an insolvent moneyed corporation upon the petition of certain of its stockholders, made under the pro-

visions of the Revised Statutes relating thereto. In April, 1879, a judgment dissolving the corporation was entered, in an action brought by the attorney general for that purpose, and Best was again appointed receiver and directed to transfer to himself, as such, the property which he held as receiver in the former proceeding. In August, 1878, an order had been made in the first proceeding passing his accounts up to June 29, 1878, and allowing him certain commissions. In August, 1879, another order was made in the same proceeding passing his accounts to date and allowing commissions computed at the rate of five per cent on receipts and disbursements.

In July, 1882, proceedings were instituted in the second action by the attorney general to compel an accounting. The attorney general, upon discovering in these proceedings the said orders so allowing the receiver commissions, moved, in June, 1883, at a special term not held by the justice by whom such orders were made, to have the said orders set aside, vacated or resettled, and to have the fees of the receiver fixed at the same rates as those allowed to executors and administrators.

The motion was denied upon the ground that the justice presiding could not review the action of another justice of the same court: *Held*, that the motion was properly denied for that reason, and that the order should be affirmed, but with leave to the attorney general to renew his application at a court held by the justice under whose authority the former orders were made. (*People* agt. *National Trust Co.*, 31 *Hun*, 20.)

3. Where, upon a case being called for trial, the defendant appears and objects to the plaintiff's proceeding with the trial upon the ground that all proceedings on his

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part have been stayed by his failure to pay costs awarded against him, and such objections are heard and overruled by the court and the trial had, the only remedy of the defendant is a motion for a new trial before the justice by whom the trial was had, or an appeal to the general term.

He cannot move, at a special term held by another justice, to have the verdict and all other proceedings on the part of the plaintiff vacated and set aside. (*Tunstall* agt. *Winton*, 81 Hun, 222.)

4. An order in supplementary proceedings, appointing a receiver, made by the court or judge authorized to make it, is to be presumed regular until annulled in a direct proceeding; and if the order recite facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. (*Wright* agt. *Nostrand*, 94 N. Y., 81.)

5. The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. (*Hagerty* agt. *Andrews*, 94 N. Y., 195.)

6. The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleadings against the moving party. (*Id.*)

7. An order allowing the receiver of a firm to come in and defend an action for goods sold, against

the members of the firm, was granted upon his petition, in which he averred collusion between plaintiffs and one or more of the defendants, but only on information and belief, without stating any facts or sources of information upon which the belief was based. This averment was positively denied by plaintiffs: *Held*, that the petition was insufficient to support the order and the same was improperly granted. (*Honegger* agt. *Wettstein*, 94 N. Y., 252.)

8. An order of general term, vacating the report of commissioners appointed in proceedings by a railroad corporation to acquire title to lands and the confirmation thereof, and directing a new appraisal before new commissioners, is not reviewable here. (*In re N. Y., W. S. and B. R. Co.*, 94 N. Y., 287.)

9. The general term, however, has no power on appeal by the company from the order of confirmation to award costs against the owners. (*Id.*)

10. Where costs are awarded, so much of the general term order is reviewable here; but this does not confer jurisdiction to review the whole order. (*Id.*)

11. Under the provisions of the Code of Civil Procedure (*sec. 756 et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the

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motion. (*Smith* agt. *Zalinski*, 94 N. Y., 519.)

12. A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record (*Code of Criminal Procedure*, sec. 487). (*People* agt. *Kelly*, 94 N. Y., 526.)

## NEGLIGENCE.

1. While sleeping car companies owe greater duties to their customers than ordinary railroad carriers of passengers, still they can only be held liable for property lost while under the control of the passenger, upon proof of some fault or negligence upon their part, and the mere fact of such loss, unaccompanied by any other proof, raises no presumption of negligence. (*Tracy* agt. *Pullman Palace Car Company*, ante, 154.)

## NEW TRIAL.

1. When a verdict is rendered subject to the opinion of the court at general term, the whole case is before the general term on its merits, and no new trial can be ordered. (*Northampton National Bank* agt. *Kidder*, ante, 95.)
2. An admission made on which a decision of the court is based is available upon a new trial of the action. (*Ansonia Brass and Copper Company* agt. *Conner*, ante, 157.)

See JURY.

*Wiggins* agt. *Downer*, ante, 65.

## NEW YORK (CITY OF).

1. By chapter 206 of Laws of 1865, the justices of the supreme court

for the first judicial department were authorized to appoint a crier of said court in the city and county of New York, and his compensation was to be fixed by the board of supervisors:

*Held*, that where, in pursuance of such authority, a crier was so appointed and his salary so fixed, the board of estimate and apportionment had no right, under the consolidation act (*Laws of 1882*, chap. 410), to reduce such salary during the term for which he was appointed. The consolidation act should be limited to future appointments made under its provisions without disturbing any rights which had vested prior to its enactment. (*Ricketts* agt. *The Mayor, &c., of New York*, ante, 820.)

2. A party may waive a statutory and even a constitutional provision made for his benefit, and having once done so, he cannot ask for its protection. And so, too, by acquiescence, or failure to present objections, he may waive the question of jurisdiction, arising out of the interpretation or construction of a statute.

Where it appeared that these commissioners of estimate and assessment were appointed after the posting of notices and advertising according to law, without any opposition having been made by any interested property owner, and no appeal was ever taken from the order appointing them, and they proceeded in the performance of their duties and followed the law strictly in every respect, and were opposed by the parties now making this motion at every step of their proceedings, until the final confirmation of their report:

*Held*, that the moving parties are now precluded from objecting to the jurisdiction of the commissioners or of the court. It is too late for the parties making this motion to object to the jurisdiction of the court, or to the right

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of the park commissioners to institute these proceedings. (*Matter of the Opening of the Spuyten Duyvil Park-way, ante, 341.*)

3. The legislature has no power, so far as the rights of abutting owners are involved, to authorize the use of the streets of the city of New York for the erection of poles to conduct telegraph and telephone wires, the legislative authority over the streets being limited to a regulation of use for which the streets are held by the city in trust, which is to appropriate and keep them open as public streets; and such erection of telegraph poles is not a street use, and does not come within the terms of the trust. A telegraph company cannot therefore invoke the equitable power of the court to restrain interference by abutting owners with its poles in city streets; even though its lines have been erected under legislative sanction. (*The Metropolitan Telephone, &c., Co., agt. The Oohwell Lead Co., ante, 365.*)

4. A teacher in a public school in New York city cannot be removed by the trustees of the ward in which such school is situated, except by the approval in writing of a majority of the inspectors of the district, and the approval on appeal of the board of education; and a transfer involving loss of rank and pay is a removal from the position occupied within the meaning of the statute.

A teacher so attempted to be removed has a remedy by *mandamus* to compel the principal of the school and the trustees of the ward, respectively, the former to place such teacher's name upon the monthly pay rolls, and the latter to certify said pay rolls to the inspectors of the district. (*Matter of Gleese, ante, 372.*)

5. The authority to locate a railroad or other structure at a certain place does not limit the location

to the extreme bounds of that place, but carries with it the authority to locate the same within such bounds. On a motion for a peremptory *mandamus* to the commissioner of public works and the department of parks "commanding them forthwith to issue and deliver to the board of trustees of the New York and Brooklyn bridge, a permit to enter upon Chatham and Centre streets in the city of New York, near the Hall of Records, and take up the pavements of said streets, and lay foundations for and erect thereupon the structure proposed by the said trustees to complete the said bridge, as shown on a map filed by said trustees in the register's office in New York city, on the 10th of April, 1884;" there were two other maps filed, one in 1874 and one in 1877:

*Held, first*, that the bridge trustees have the legal right to do precisely what they propose to do, as indicated by the map of 1884 (*i. e.*, to occupy Chatham and Centre streets), and that they are not precluded by the filing of the maps of 1874 and 1877, from erecting such a structure as is shown on the map or diagram filed in 1884. The maps filed from time to time do not and could not affect the *termini*.

*Second*. The location of the New York terminus at the west side of Centre street is authorized.

*Third*. That the provisions of the act which declare that the said bridge "shall not obstruct any street which it shall cross, but that such street shall be spanned by a suitable arch or suspended platform as shall give suitable height for the passage under the same, for all purposes of public travel and transportation," does not refer to the approach to, or the terminus of, the bridge.

*Fourth*. That as it is the legal right of the trustees to enter upon the performance of the work contemplated by them, it is the pub-

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lic duty of the commissioner of public works and the park commissioners to issue the permits asked for and to license the excavations which are necessary to enable the former to prosecute their work, and a *mandamus* is the proper remedy to compel them so to do. (*The People ex rel Stranahan* agt. *Thompson*, ante, 491.)

## NON-RESIDENTS.

See ATTACHMENT.

*McKinlay* agt. *Fowler*, ante, 388.

## PARTIES.

1. The complaint alleged that A. delivered to B. jewelers' sweepings worth \$4,292 to be refined, for which refining A. was to receive \$320, and that B. subsequently assigned to defendants all his plant, &c., including A.'s sweepings, the defendants assuming all the debts and liabilities of B. and taking possession of B.'s property, and judgment is asked for the value of the sweepings less the cost of refining.

*Held* (overruling demurrer to complaint), that defendants having assumed an obligation must be held liable for its consequences; that no issue is presented as to the conversion of property, and if there were the question of the non-joinder of B. is not available, because as joint tortfeasors the defendants would be individually liable. (*Otis* agt. *Seligman et al.*, ante, 101.)

2. Substitution — when one of several devisees may be substituted by the general term as plaintiff in an action of ejectment, upon the death of the testator, during the pendency of an appeal. (See *Van Horne* agt. *France*, 32 *Hun*, 504.)

3. Judgment of divorce — petition to have it vacated because of

fraud — when the petitioner shows no right to intervene — power of the court to impose upon him the payment of the costs — the court cannot modify an order, of its own motion, without notice to the parties interested. (See *Simmons* agt. *Simmons*, 32 *Hun*, 551.)

4. Will — trusts — when the power of alienation is not unlawfully suspended — when the validity of a trust cannot be passed upon, because the persons to be affected by the decision cannot be ascertained and made parties. (See *Tiers* agt. *Tiers*, 32 *Hun*, 184.)

5. Sewers — when their construction by a city will be enjoined, on the application of a party to be injured thereby — it is not necessary that the injury should result immediately after their construction — the person contracting to build the sewer may be made a defendant. (See *Morgan* agt. *City of Binghamton*, 32 *Hun*, 602.)

6. Statutory foreclosure — the personal representatives of a deceased mortgagor must be served with notice — 3 Revised Statutes (5th ed.), 860. (See *Van Schaack* agt. *Saunders*, 32 *Hun*, 515.)

7. What actions against an unincorporated association may be brought against its president or treasurer. (See *Duncan* agt. *Jones*, 32 *Hun*, 12.)

## PARTNERSHIPS.

1. Business partnerships between husband and wife are not authorized by the statutes of the state of New York, and contracts in the conduct of such business are not enforceable against the wife. (*Fairlee* agt. *Bloomingtondale*, ante, 292.)

2. Any declaration of the wife that she sustains the relation to her

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husband of a partner in business is not binding upon her. (*Id.*)

3. The case of *Zimmerman* agt. *Erhard and Dodge* (58 *How.*, 11) criticised and not followed.

## PENAL CODE.

1. Sections 217, 218, 219—A warrant of commitment reciting a conviction for the crime of assault and battery and a sentence to imprisonment thereon is valid. (*People* agt. *Gray*, *ante*, 456.)

## PLEADING.

1. Appeal—does not lie from an order sustaining a demurrer. (*See Welch* agt. *Platt*, 32 *Hun*, 194.)
2. When the facts stated in a complaint constitute but a single cause of action. (*Id.*)
3. Complaint—motion to make it more definite and certain—allegation that the plaintiff has been deceived by false representations made by the officers and agents of a defendant corporation—when the names of such officers and agents must be given. (*See Schellens* agt. *Equitable Life Ass. Soc.*, 32 *Hun*, 235.)
4. Demurrer to answer—the defendant cannot object on the ground of the insufficiency of any allegation of the complaint admitted by his answer—liability of a trustee of a mining company for a failure to file a report—1848, chapter 40, section 12. (*See Morey* agt. *Ford*, 32 *Hun*, 446.)
5. Partition—the omission of a plaintiff to allege that the parties do not own any other land in common in this state is not a ground of demurrer—General Rule No. 65—effect of a failure to comply with it. (*See Pritchard* agt. *Dratt*, 32 *Hun*, 417.)

6. Judgment—to operate as a bar, it must be pleaded as such. (*See Henderson* agt. *Scott*, 32 *Hun*, 412.)

7. Counter-claim—when one existing in favor of a part of the defendants may be set up by them. (*See Clegg* agt. *Cramer*, 32 *Hun*, 162.)

8. Action in a justice's court—plea of title—when it is rendered necessary by the form of the complaint—the party recovering upon this issue is entitled to the costs. (*See Falkel* agt. *Moore*, 32 *Hun*, 298.)

9. Evidence—action for slander—facts tending to mitigate damages cannot be proved unless they are pleaded. (*See Blanchard* agt. *Tulip* 32 *Hun*, 638.)

10. Where two causes of action upon contract are joined in the same action a demurrer to the complaint upon the ground that all of the defendants are not affected by both causes lies at the instance of a defendant who is so affected. The objection is not to the misjoinder of parties, but of causes of action, and so the rule that a defendant against whom a good cause of action is pleaded may not demur because too many are joined does not apply. (*Nichols* agt. *Drew*, 94 *N. Y.*, 22.)

11. It is not a ground for a motion to dismiss the complaint in an action for libel that the innuendoes therein are ambiguous or uncertain; any question as to their meaning may be submitted, upon proper requests, to the consideration of the jury. (*Bergmann* agt. *Jones*, 94 *N. Y.*, 51.)

12. The complaint in an action to foreclose a mortgage alleged that the mortgage, with accompanying bond, was executed and delivered to the mortgagees named, to secure the payment of \$4,000, and that it was duly assigned and transferred

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to plaintiff; the answer admitted the execution of the securities as alleged, and the due assignment thereof to the plaintiff, but averred that they were made in pursuance of an usurious agreement with the plaintiff. The trial court found the usurious agreement substantially as alleged, and that the bond and mortgage was never delivered to, or in the possession of the mortgagees: *Held*, that in the absence of any waiver of the admission in the pleadings, this last finding was error (*Code of Civil Procedure, sec 522*). (*Dunham agt. Cudlipp, 94 N. Y., 129.*)

13. The court has no power, on motion of a party defendant, to strike out all the allegations of the complaint referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. (*Hagerty agt. Andrews, 94 N. Y., 195.*)

14. Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer. (*Knapp agt. Roche, 94 N. Y., 329.*)

## PRACTICE.

1. Though under ordinary circumstances the party only who has noticed a cause for trial can move it for that purpose, yet when a cause has been specially set down for the day on which it was moved, and no objection was made to the right of the defendant to move it, and the plaintiff's counsel, after the jury was drawn, simply refused to proceed with the trial, the court was justified in direct-

ing a dismissal of the complaint. (*Huberstich agt. Fischer, ante, 318.*)

2. *Certiorari* is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under section 809 of the Code of Criminal Procedure. (*The People ex rel. Sherrer agt. Walsh, ante, 482.*)

3. Such a proceeding is not a criminal action as defined in that Code, and the justice before whom it is brought sits as a magistrate and not as a court of special sessions. No appeal is given in such proceedings. (*Id.*)

4. On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him because she was in imminent danger of suffering personal violence at his hands, her case is made out, and it is therefore error on the part of the magistrate to exclude such testimony. (*Id.*)

5. Judgment-creditor — an action to set aside a fraudulent conveyance, and to have the property adjudged to be subject to the lien of his judgment and the execution issued thereon and then in the sheriff's hands, is not affected by the return, during its pendency, of the execution — when devisees of the judgment-debtor need not be made parties — when a firm creditor may set aside an assignment of the individual property of the partner — misjoinder of causes of action. (*See Royer Wheel Co. agt. Fielding, 81 Hun, 274.*)

6. Landlord and tenant — attornment of a tenement to one who has acquired the landlord's title upon a sheriff's sale under an execution and a warrant of dis-

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- possession in summary proceedings based thereon — effect of a subsequent reversal of the judgment on which the summary proceedings were based — right of the tenant to deny his lessor's title. (*See Ross* agt. *Kernun*, 31 *Hun*, 164.)
7. Dower — action by a widow to vacate a deed in which she had joined with her husband — when she may recover in such an action her dower interest — when she must recover such interest in an action to have her dower ad-measured — she cannot recover rents from her husband's grantee prior to her demand for dower. (*See Witthaus* agt. *Schack*, 31 *Hun*, 590.)
8. Action for divorce — power of the special term to review the report of a referee — it can only refuse to confirm it because of fraud or collusion — Code of Civil Procedure, sections 1228, 1229.) (*See Ross* agt. *Ross*, 31 *Hun*, 140.)
9. Obstruction of a street — right of the people to bring an action to abate the nuisance — when it should be tried before a jury — judgment abating a nuisance — when the verdict of the jury must specify the unlawful structure, or the unlawful portion thereof. (*See People* agt. *Metropolitan Telephone Co.*, 31 *Hun*, 596.)
10. Action for divorce — power of the court to provide for the support of a child, after the entry of a judgment therein which contains no provision therefor — section 59 of 2 Revised Statutes, 148, is continued in force as to actions theretofore determined by subdivision 2 of section 3 of chapter 245 of 1880. (*See Catlin* agt. *Catlin*, 31 *Hun*, 632.)
11. Action for a limited divorce — no allowance for counsel fees can be made after a judgment has been entered — Code of Civil Procedure, section 1769. (*See Winton* agt. *Winton*, 31 *Hun*, 290.)
12. Inquest — when it will be set aside because of the unexpected absence of one of the defendant's material witnesses — the right to do so is not affected by the fact that the trial court refused to postpone the trial. (*See Cahill* agt. *Hilton*, 31 *Hun*, 114.)
13. Costs — discretion of the court as to, in equitable actions not reviewable on motion — the clerk must follow the decision of the court as to — additional allowance in foreclosure cases limited to two and one-half per cent — Code of Civil Procedure, section 8253. (*See Rosa* agt. *Jenkins*, 31 *Hun*, 384.)
14. Costs — when they belong to the attorney for the successful party — when they cannot be set off against the general costs awarded to the other party. (*See Tunstall* agt. *Winton*, 31 *Hun*, 219.)
15. Costs — where on a trial before a referee the plaintiff recovers a judgment against one of the defendants only, the other defendant can only have costs awarded to him upon a motion to the court — Code of Civil Procedure, sections 1018, 3229. (*See New York Elevated R. R. Co.* agt. *McDaniel*, 31 *Hun*, 310.)
16. Costs — liability of a municipal corporation therefor, in an action commenced in a justice's court — Code of Civil Procedure, section 8347, subdivisions 13, 3245. (*See Marsh* agt. *Village of Lansingburgh*, 31 *Hun*, 514.)
17. Will — probate of — when both witnesses must be examined — a witness who must be examined cannot take anything under the will — 2 Revised Statutes (*Edm. ed.*), 65, section 50 — the rule is not changed by the subsequent legislation as to the examinatic-

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- of interested witnesses. (*See Matter of Brown*, 81 Hun, 166.)
18. Purchaser at a foreclosure sale — when he will be compelled to complete the purchase, although two of the defendants were lunatics for whom no committees had been appointed. (*See Prentiss* agt. *Cornell*, 81 Hun, 167.)
19. Partition — no sale can be ordered in an action brought by one tenant in common of a vested remainder — Code of Civil Procedure, section 1533 — Effect of the consent of the owner of the prior estate — a purchaser will not be compelled to accept a doubtful title. (*See Scheu* agt. *Lehning*, 81 Hun, 183.)
20. Examination of a party before trial — the testimony must be shown to be material and necessary — Code of Civil Procedure, section 872, subdivision 4 — general rule, No. 83 — right to examine the president of a joint-stock association in an action against the association in his name as president — Code of Civil Procedure, section 1919. (*See Wayne Co. Savings Bank* agt. *Brackett*, 81 Hun, 484.)
21. Order for the examination of a party before trial — not granted to enable the party seeking it to prove that his adversary is guilty of a crime of fraud — Code of Civil Procedure, section 873. (*See Andrews* agt. *Prince*, 81 Hun, 233.)
22. Evidence — examination of a party before trial — when it cannot be read in evidence upon the trial of a new action brought after his death by his executor. (*See Murphy* agt. *N. Y. C. and H. R. R. Co.*, 81 Hun, 338.)
23. A party to an action cannot be compelled to appear for examination before trial in any county other than the one in which he resides or has an office — Code of Civil Procedure, section 886. (*See Gustaf* agt. *American Steamship Co.*, 81 Hun, 95.)
24. Motion to vacate an attachment — power of the court to amend the warrant — limitation upon the right of the plaintiff to oppose the motion by new proof — waiver of objection to the new proof offered — (Code of Civil Procedure, sections 683, 723 — Attachment will issue though fraudulent transfer of property made in another state. (*See Kibbe* agt. *Wetmore*, 81 Hun, 424.)
25. Service of summons by publication — in what class of actions an order for such service may be made — what facts show that the defendant cannot be served within the state. (*See Lockwood* agt. *Brantley*, 81 Hun, 155.)
26. Unincorporated association — actions against — upon whom the summons may be served when it has no president or treasurer — Code of Civil Procedure, section 1919. (*See Hatheway* agt. *Am. Mining Stock Exchange*, 81 Hun, 575.)
27. Surrogate's bond — right of the people to bring an action thereon against the sureties thereto — liability of a surrogate to account for moneys received by him — what facts are required to excuse his failure to pay the same over to the person entitled thereto. (*See People ex rel. Nash* agt. *Faulkner*, 81 Hun, 317.)
28. Action by a stockholder to restrain wrongful acts of the corporation — a refusal of the corporation, after demand, to bring the action must be alleged — mere neglect to do so is not enough to justify the stockholder in acting. (*See Leslie* agt. *Lorillard*, 81 Hun, 805.)
29. When an action to recover land may be brought by the

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- grantee in the name of the grantor — when the beneficiaries are sufficiently represented in an action by their trustee and need not be made parties. (*See Van Voorhis* agt. *Kelly*, 31 *Hun*, 293.)
30. One justice of the supreme court cannot review the decision of another, except as to provisional remedies and the cases arising under section 772 of the Code of Civil Procedure. (*See People* agt. *Nat. Trust Co.*, 31 *Hun*, 20.)
31. Attachment — may be vacated on motion after it has become inoperative by reason of a failure to serve the summons — Code of Civil Procedure, section 638. (*See Belzemann* agt. *Brooks*, 31 *Hun*, 271.)
32. Attachment — the fees and expenses of the sheriff are to be adjusted by the judge issuing the warrant — they cannot be adjusted by the court — on an application for their adjustment no direction can be given as to the person by whom they shall be paid — Code of Civil Procedure, section 3307, subdivision 2, 3287. (*See Hall* agt. *U. S. Reflector Co.*, 31 *Hun*, 609.)
33. Attachment — the affidavit must show that a cause of action exists in favor of the plaintiff — when a demand and refusal to pay for services rendered must be alleged. (*See Smadbeck* agt. *Sisson*, 31 *Hun*, 532.)
34. Attachment — the affidavit upon which it is granted should show clearly that a cause of action exists in favor of the plaintiff. (*See Reilly* agt. *Sisson*, 31 *Hun*, 572.)
35. Striking out allegations from the complaint — action to recover a chattel wrongfully detained — when the facts showing the detention to be wrongful should be stated in the complaint — Code of Civil Procedure, section 1721. (*See Davenport Glucose Mfg. Co.* agt. *Taussig*, 31 *Hun*, 563.)
36. Void assessment — payment by the owner of land under protest — when he may recover back the amount so paid without first having the assessment vacated. (*See Bruecher* agt. *Village of Portchester*, 31 *Hun*, 550.)
37. Writ of *habeas corpus* should not issue when the person is not in the custody of the respondent at the time of the application. (*See Matter of Larson*, 31 *Hun*, 539.)
38. Appeal — it lies from an order overruling a demurrer — Code of Civil Procedure, section 1349. (*See Hand* agt. *Supervisors of Columbia Co.*, 31 *Hun*, 531.)
39. Jurisdiction — when the courts of this state will not entertain jurisdiction over an action affecting trust property in another state. (*See Alger* agt. *Alger*, 31 *Hun*, 471.)
40. Interpleader — effect of an executor's taking a security in his own name, upon the loan of funds of the estate — his executors are entitled to collect it. (*See Caulkins* agt. *Bolton*, 31 *Hun*, 458.)
41. Demand for damages in the complaint — condition upon which the amount claimed may be increased after verdict — the plaintiff will not be allowed to treble the damages found by the jury if the increased amount will exceed the sum demanded in the complaint. (*See Pharis* agt. *Gere*, 31 *Hun*, 443.)
42. Report of railroad commissioners — it will not be set aside for the improper receipt by them of a communication from the counsel for the company, which did not affect their action. (*See Matter of N. Y., W. S. and B. R. R. Co.*, 31 *Hun*, 440.)

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43. When an action and not a *mandamus* is the proper remedy of a creditor of a municipal corporation. (*See Utica Water-Works Co. agt. City of Utica*, 31 Hun, 426.)
44. Action to set aside a fraudulent conveyance — when an attaching creditor cannot maintain it, before the recovery of a judgment and the issue and return of an execution. (*See Bowe agt. Arnold*, 31 Hun, 256.)
45. Communication between the judge and the jury after its retirement — when it does not furnish a ground for setting aside the verdict — how the error, if any, in making such a communication is to be corrected — Code of Criminal Procedure, sections 467, 465, 831. (*See People agt. Kelly*, 31 Hun, 225.)
46. Motion — a decision of one justice cannot be reviewed at a special term held by another — Code of Civil Procedure, section 1002. (*See Tunstall agt. Winton*, 31 Hun, 222.)
47. Election of remedies — once made is irrevocable — when the issuing of an execution upon a judgment, pending an appeal, is a waiver of all right to resort to an undertaking given thereon. (*See Collins agt. Bull*, 31 Hun, 187.)
48. Assessment — application to vacate it — no objection can be considered, unless it is stated in the petition. (*See Matter of Clark*, 31 Hun, 198.)
49. Receiver in supplementary proceedings — power of the court to remove him — he must have notice of the charges against him and an opportunity to be heard. (*See Bruns agt. Stewart Mfg. Co.*, 31 Hun, 195.)
50. Receiver of an insolvent life insurance company — must file his accounts with the general term — power of that court over them — it may appoint a referee to determine as to the amount and value of the services rendered to the receiver by attorneys and counselors. (*See People agt. Knickerbocker Life Ins. Co.*, 31 Hun, 622.)
51. Insolvent insurance company — an attorney for policyholders has no legal claim against the receiver for compensation for his services. (*See Atty. Genl. agt. Continental Life Ins. Co.*, 31 Hun, 623.)
52. Receiver of rents and profits — when appointed in an action to foreclose a contract for the sale of land. (*See Smith agt. Kelley*, 31 Hun, 387.)
53. Corporation — liability of its president for false statements made to procure credit for it — an action will lie against him by the seller of the goods before the price is due from the corporation. (*See Phillips agt. Wortendyke*, 31 Hun, 192.)
54. Temporary injunction — application to dissolve it, on giving an undertaking — Code of Civil Procedure, section 629, as amended by chapter 404 of 1883 — the undertaking must comply with it strictly. (*See Chamberlain agt. Buffalo, N. Y. and P. R. R. Co.*, 31 Hun, 339.)
55. Reference — An action to charge lands in the hands of heirs or devisees, with debts of an ancestor, is only referable by consent — Code of Civil Procedure, section 1013 — when the right to appeal is not lost by participating in the reference. (*See Read agt. Lozin*, 31 Hun, 286.)
56. Joint accommodation maker — effect of a judgment recovered against him alone — it is not affected by his death. (*See Smith agt. Osborne*, 31 Hun, 390.)

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57. New trial in criminal cases—when granted on the ground of newly discovered evidence—Code of Criminal Procedure, section 465. (*See People* agt. *Lane*, 31 *Hun*, 13.)
58. Arbitration—a submission to arbitration affects a discontinuance of the action. (*See McNulty* agt. *Solley*, 31 *Hun*, 17.)
59. Trial by board of police commissioners of New York—rule that where testimony has been taken before less than three commissioners, it must be laid before and examined by the several commissioners—construction of it. (*See People ex rel. Swift* agt. *Police Comrs.*, 31 *Hun*, 40; *People ex rel. Sheridan* agt. *French*, 31 *Hun*, 617.)
60. Motion to change the place of trial for the convenience of witnesses—the old rules as to what the affidavits must contain should be strictly enforced. (*See Carpenter* agt. *Continental Ins. Co.*, 31 *Hun*, 78.)
61. Undertaking on appeal—when it is insufficient—Code of Civil Procedure, section 1327. (*See Hollister* agt. *Mc Neill*, 31 *Hun*, 629.)
62. Appeal—does not lie from an order sustaining a demurrer—when the facts stated in a complaint constitute but a single cause of action. (*See Welch* agt. *Platt*, 32 *Hun*, 194.)
63. Appeal—power of the general term to modify a judgment, upon a stipulation of the party, and affirm it as modified—effect upon a stipulation so filed of an appeal to the court of appeals, by the unsuccessful party, and his obtaining there a general judgment of reversal and a new trial. (*See Crim* agt. *Starkweather*, 32 *Hun*, 350.)
64. What errors can be corrected upon an appeal from a decree of the surrogate, on the final settlement of an executor's accounts, without any case being prepared and settled—Code of Civil Procedure, section 998. (*See Matter of Jackson*, 32 *Hun*, 200.)
65. Award—appeal from an order confirming the report of arbitrators, or from the judgment entered thereon—upon what papers it must be heard—no case can be proposed or served. (*See Matter of Poole* agt. *Johnson*, 32 *Hun*, 215.)
66. Injunction—when it will be granted to restrain the prosecution of actions brought in another state. (*See Dinsmore* agt. *Neresheimer*, 32 *Hun*, 204.)
67. Tenant for life of real estate—right of one interested in the remainder to prevent his alienating the estate. (*See Collins* agt. *Collins*, 32 *Hun*, 156.)
68. Temporary injunction—when it should not be granted—when the use of water by a village for public purposes will not be restrained on the application of the company furnishing it. (*See West Troy Water-Works Co.* agt. *Green Island*, 32 *Hun*, 530.)
69. Undertaking given upon procuring an injunction—what expenses incurred in procuring its dissolution may be allowed as a part of the damages—it is sufficient if the expenses be actually incurred, they need not have been paid. (*See Crounse* agt. *Syracuse, C. and N. Y. R. R. Co.*, 32 *Hun*, 497.)
70. Temporary injunction—a reference to ascertain the damages resulting therefrom cannot be ordered until the plaintiff's right to it has been finally decided—how this decision must be made. (*See Kelly* agt. *McMahon*, 32 *Hun*, 347.)
71. Injunction—damages allowed

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- upon its dissolution — what are to be included in them. (*See Lyons agt. Hersey*, 32 Hun, 253.)
72. Attachment — what must be shown to authorize the issuing of one on the ground of the non-payment of alimony. (*See Ryckman agt. Ryckman*, 32 Hun, 193.)
73. Attachment — the affidavit must show a right to recover actual, as distinguished from nominal damages — motion papers need not specify defects which relate to the merits — what objection not taken below cannot be raised on appeal — right of one partner to have an attachment against the firm property vacated. (*See Watts agt. Nichols*, 32 Hun, 276.)
74. Attachment — it cannot issue in an action brought to enforce a statutory liability — Code of Civil Procedure, sections 8247, 635. (*See Remington agt. O'Dougherty*, 32 Hun, 255.)
75. Attachment — duty of the sheriff to retain the goods and to retake them by force, if necessary, from one who wrongfully removes them — liability of the sheriff for a failure so to do. (*See Wood agt. Bodine*, 32 Hun, 354.)
76. Attachment — duty of the sheriff to collect and hold demands attached. (*See Davidson agt. Chatham Nat. Bank*, 32 Hun, 138.)
77. Parties — when the validity of a trust cannot be passed upon because the persons to be effected by the decision cannot be ascertained and made parties. (*See Tiers agt. Tiers*, 32 Hun, 184.)
78. Actions against the president or treasurer of an unincorporated association — the officer so sued cannot be examined as a party before trial — Code of Civil Procedure, sections 870, 1919 — as to what actions, against unincorporated associations, may be brought against their president or treasurer. (*See Duncan agt. Jones*, 32 Hun, 12.)
79. Substitution — when one of several devisees may be substituted by the general term as plaintiff in an action of ejectment, upon the death of a testator, during the pendency of the appeal. (*See Van Horne agt. France*, 32 Hun, 504.)
80. Action — in the absence of fraud and collusion it may be settled by the parties without the consent of their attorneys. (*See Root agt. Vanduzen*, 32 Hun, 63.)
81. Temporary administrator — the special guardian of an infant may apply for his appointment — the discretion of the surrogate in granting the application will not be reviewed — Code of Civil Procedure, section 2668. (*See Matter of Chase*, 32 Hun, 318.)
82. Guardian — power of a surrogate to compel him to account — the surrogate cannot compel the representatives of a deceased guardian to account and pay over a balance due from him. (*See Andrade agt. Cohen*, 32 Hun, 225.)
83. Transfer fraudulently procured from a testatrix — right of a devisee to have it set aside — an action will lie by him although the will has not been proved — a surrogate's court has no jurisdiction over such an action. (*See Norris agt. Norris*, 32 Hun, 175.)
84. Fraudulent assignment of personal property — a creditor cannot set it aside under a judgment recovered after a general assignment has been made. (*See Lowery agt. Clinton*, 32 Hun, 267.)
85. Dissolution of a corporation during the pendency of an action brought by it — the action is not thereby abated — it may be continued without an order of the court, by the receiver or by an

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- assignee in bankruptcy—2 Revised Statutes (6th ed.), 392, section 11—United States Revised Statutes, 981, section 5047—Code of Procedure, section 121. (*See Platt agt. Ashman*, 32 Hun, 230.)
86. Action to sequester the property of a corporation—notice of a motion to appoint a receiver must be given to the attorney general—1883, chapter 378, section 8—when a second receiver of the company may object to the invalidity of the order appointing the first—powers and duties of a receiver appointed in an action for sequestration—he takes the corporate property subject to the rights of mortgagees and their receiver—notice of motion—to whom it should be given—a judge cannot consider a paper submitted after argument by one party without notice to the other. (*See Whitney agt. N. Y. and Atlantic R. R. Co.*, 32 Hun, 164.)
87. Highway—encroachment upon it—certificate of a jury, summoned under section 105 of 1 Revised Statutes, 522—question as to whether an appeal lies therefrom to the county court—Code of Civil Procedure, section 8044. (*See Commissioners of Jamaica agt. Van Allen*, 32 Hun, 81.)
88. Laying out a private road—appeal from the decision of the commissioners of highways—presumption in favor of regularity—upon the hearing of a *certiorari* the record only can be considered—power of the referees appointed by the county judge on such an appeal, to consider the damages of the landowner. (*See People ex rel. Cashman agt. Hedden*, 32 Hun, 209.)
89. Obstruction in a sidewalk by the erection of an electric-light pole—when the city authorities will not be compelled by *mandamus* to remove it. (*See People ex rel. McManus agt. Thompson*, 32 Hun, 93.)
90. Place of trial—power of the court to change it—Code of Civil Procedure, sections 982, 983, 984, 987. (*See Gorman agt. South Boston Iron Co.*, 32 Hun, 71.)
91. Reference—when one should be ordered—the referee need not reside in the county in which the venue is laid—the referee may be authorized to sit in any county to take testimony. (*See O'Brien agt. Catskill Mountain R. R. Co.*, 32 Hun, 636.)
92. Effect of a general exception to a referee's conclusions of law. (*See Riley agt. Sexton*, 32 Hun, 245.)
93. Decision of an issue of fact by a surrogate—he must file findings of fact and conclusions of law—Code of Civil Procedure, section 2545—what papers must be presented to the general term on an appeal from his decision. (*See Waldo agt. Waldo*, 32 Hun, 251.)
94. District attorney—when he may act as surrogate—how the disability of the surrogate and county judge may be inquired into. (*See People ex rel. Oakley agt. Petty*, 32 Hun, 443.)
95. A judgment against an executor is not a lien upon the real estate of the deceased—when debts are charged upon the real estate by the will—when such a lien may be enforced against the proceeds arising from the sale of land of the deceased in an action for partition. (*See Hubbard agt. Dayton*, 32 Hun, 220.)
96. Justices' court—entry of a judgment for too large an amount—power of the successful party to remit a part of it—costs of an appeal to the county court. (*See Allen agt. Swan*, 32 Hun, 363.)
97. Action in a justice's court—plea of title—when it is rendered

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necessary by the form of the complaint—the party recovering upon this issue is entitled to the costs. (See *Falkel* agt. *Moore*, 32 Hun, 293.)

98. Criminal law—when an expression of an opinion by the judge, as to the weight of evidence, requires that a new trial be granted—right to convict of larceny on an indictment for robbery. (See *People* agt. *Langton*, 32 Hun, 461.)

99. Forgery in second degree—the indictment must allege an intent to defraud—Penal Code, section 511—incorporation of a foreign bank—how it may be proved on the trial of an indictment for forging its notes—the court will take judicial notice of the legal relations existing between foreign countries. (See *People* agt. *d'Ar-gencour*, 32 Hun, 178.)

100. Trial of an action at a special term in case of the disability of the surrogate—Code of Civil Procedure, sections 2545, 2486—requests for findings—power of the justice to allow them to be made after the case has been submitted—General Rule No. 32. (See *Matter of Chauncey*, 32 Hun, 429.)

101. Counter-claim—when one existing in favor of a part of the defendants may be set up by them. (See *Clegg* agt. *Cramer*, 32 Hun, 162.)

102. Right of a party defrauded to waive the tort and proceed, or interpose a counter-claim based upon an implied contract against one of several wrong-doers. (See *City Nat. Bank* agt. *Nat. Park Bank*, 32 Hun, 105.)

103. Service of a summons by publication—the affidavit must show that the defendant cannot after due diligence be found within the state—Code of Procedure, sec-

tion 135. (See *Kennedy* agt. *N. Y. Life Ins. and Trust Co.*, 32 Hun, 36.)

104. Complaint—motion to make it more definite and certain—allegation that the plaintiff has been deceived by false representations made by the officers and agents of a defendant corporation—when the names of such officers and agents must be given. (See *Schellens* agt. *Equitable Life Ins. Ass. Soc.*, 32 Hun, 235.)

105. Execution—form of, when issued upon a judgment recovered in an action against an absconding debtor served by publication—Code of Civil Procedure, sections 438, 1370—when an execution and the sale had thereunder will be set aside. (See *Place* agt. *Riley*, 32 Hun, 17.)

106. Supplementary proceedings—they need not be instituted in the judicial district in which the action was tried. (See *Jacobson* agt. *Doty Plaster Mfg. Co.*, 32 Hun, 436.)

107. Assessment—right of a party to have it reduced after it has been paid, and to recover the amount of his over-payment in the same action. (See *Delano* agt. *Mayor*, 32 Hun, 144.)

108. A warrant for the collection of taxes is not invalidated by the omission of the dollar sign before the figures—replevin will not lie where the warrant is regular on its face. (See *American Tool Co.*, agt. *Smith*, 32 Hun, 121.)

109. Costs—when costs paid in pursuance of an order cannot be taxed by the party paying them after the recovery of a judgment by him. (See *Seneca Nation of Indians* agt. *Hawley*, 32 Hun, 288.)

110. Sheriff's fees on a levy and sale—when the plaintiff may compel a taxation of them. (See

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*Mallory* agt. *Reichert*, 82 Hun, 86.)

111. Action to determine title to office—right of the successful party to recover damages from the intruder—the salary received is the measure of damages—a defense cannot be raised on appeal which was not taken below. (*See People ex rel Swinburne* agt. *Nolan*, 82 Hun, 612.)

112. Claims against the estate of a deceased person—over what class of claims the referee has jurisdiction—when he may take and state the account of a special guardian to sell an infant's real estate. (*See Skidmore* agt. *Post*, 82 Hun, 54.)

113. Tenants in common of a crop—what acts of the party in possession do not amount to a conversion—when an action for a breach of contract, and not one of replevin, should be brought. (*See Thomas* agt. *Williams*, 82 Hun, 257.)

114. *Habeas corpus*—what errors in the sentence of a prisoner may be reviewed under it—when the application for it should be denied although the sentence is illegal—punishment for an assault in the third degree. (*See People ex rel. Devoe* agt. *Kelly*, 82 Hun, 536.)

115. Judgment of divorce—petition to have it vacated because of fraud—when the petitioner shows no right to intervene—power of the court to impose upon him the payment of costs—the court cannot modify an order, of its own motion, without notice to the parties interested. (*See Simmons* agt. *Simmons*, 82 Hun, 551.)

116. Statute of limitations—when the provisions of the new Code are applicable to causes of action existing at the time of its passage—Code of Civil Procedure, sections 309, 414—Code of Procedure,

section 99. (*See Burgett* agt. *Strickland*, 82 Hun, 264.)

117. Joinder of causes of action—an action for a tort, and an action to recover, as upon an implied contract waiving the tort, cannot be united—Code of Civil Procedure, section 484. (*See Teall* agt. *City of Syracuse*, 82 Hun, 332.)

118. Evidence—right of a party to call all his witnesses—when the circuit judge cannot limit the number. (*See Reynolds* agt. *Port Jervis Boot and Shoe Factory*, 82 Hun, 64.)

119. *It seems*, that the party aggrieved, by an order of general term, affirming an interlocutory judgment, must wait until final judgment is entered, when he may either appeal directly to this court (*Code of Civil Procedure*, sec. 1336), in which case the appeal will bring up for review only the determination of the general term, affirming the interlocutory judgment, or he may appeal to the general term (sec. 1350), which appeal will bring up for review only the proceedings after the interlocutory judgment, and in case of affirmance he may appeal to this court, which appeal will present for review all the questions of law involved in the whole case. (*Raynor* agt. *Raynor*, 94 N. Y., 248.)

120. *It seems*, also, that where the general term, on appeal from either the interlocutory or the final judgment, grants a new trial, an appeal may be taken to this court (Secs. 190, 191). (*Id.*)

121. *It seems*, that a party aggrieved by an interlocutory judgment may also, after entry of the judgment, move for a new trial (sec. 1001) on one or more exceptions contained in a case settled as prescribed (sec. 997), and from the order granting or refusing the motion an appeal may be taken to this court (Sec. 190). (*Id.*)

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122. An appellant is simply bound to present his case to the general term upon the case as settled, and to this court upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case, but disallowed by the trial judge. (*Kilmer* agt. *N. Y. C. and H. R. R. R. Co.*, 94 *N. Y.*, 495.)
123. Under the provisions of the Code of Civil Procedure (*sec. 756 et seq.*), where, after issue has been joined in an equity action, the plaintiff transfers his interest, the transferee may move to be substituted as plaintiff; and where, upon such motion, made with due notice to the defendant, an order of substitution is granted without directing supplemental pleadings, or an amendment of the complaint, aside from such substitution, the question as to title in the substituted plaintiff is determined by the order, and may not be raised upon the trial; and this, although defendant made default upon the motion. (*Smith* agt. *Zalinski*, 94 *N. Y.*, 519.)
124. A motion for arrest of judgment in a criminal action could not, before the adoption of the Code of Criminal Procedure, and cannot now, be made, save for some defect that appears upon the record; it may not be based upon proof by affidavit of facts outside, and constituting no part of the record (*Code of Criminal Procedure, sec. 467*). (*People* agt. *Kelly*, 94 *N. Y.*, 526.)
125. As the act of 1879 (*chap. 542, Laws of 1879*), amending the provisions of the Code of Civil Procedure (*sec. 549*) in reference to arrest, by authorizing an arrest in an action on contract where fraud is alleged in the complaint, and declaring that where such an allegation is made, plaintiff cannot recover without proving fraud, by its terms (*sec. 2*), does not apply to actions theretofore commenced, it is not essential in such an action where the defendant has been arrested on affidavits charging fraud, to amend the complaint by inserting therein allegations of fraud, nor is it necessary to prove the fraud on the trial. (*Humphrey* agt. *Hayes*, 94 *N. Y.*, 594.)
126. The decree upon the accounting of an executor directed the executor to pay to the auditor and referee, appointed to take and state the account, the sum of \$1,000. It did not appear how many days were occupied by the referee, or whether any rate of compensation was stipulated for: *Held*, that the question as to the propriety of the allowance was not presented on appeal. (*Hancox* agt. *Meeker*, 95 *N. Y.*, 528.)
127. *It seems*, that to present the question, the contestant should have raised it by motion before the judge taking the accounting upon papers, showing that the allowance was excessive and unlawful. (*Id.*)
128. An application for an order dispensing with or limiting the security required to stay execution on appeal to this court, may not be made here, but should be made to the court "in or from which the appeal is taken" (*Code of Civil Procedure, sec. 1312*). (*Hills* agt. *Peekskill Savings Bank*, 95 *N. Y.*, 675.)
129. *It seems*, that the only cases where the application may be made to the court to which the appeal is taken (except where the appeal is in the same court which rendered the judgment or made the order appealed from) are those where the appeal is to the supreme court from an inferior court or to a general term of the supreme court, or of a superior city court in a special proceeding. (*Id.*)

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## PREFERENCE ON CALENDAR.

1. When an action is brought upon a judgment rendered in a chancery court in the state of Tennessee in an action on a policy of fire insurance on motion for a preference on the calendar:

*Held*, that the action being against a corporation, and founded upon a judgment, which is an evidence of debt for the absolute payment of money, the right to a preference appears upon the face of the pleadings, and is absolute without any qualification or condition of any kind. It is a right given by statute, which no court can by rules or otherwise limit or abridge. (*McArthur* agt. *Commercial Fire Insurance Company*, ante, 510.)

## PUBLIC SCHOOL TEACHERS.

See NEW YORK (CITY OF.)  
*Matter of Gleese*, ante, 372.

## RAILROADS.

1. When the Tonawanda railroad, extending from Rochester to Attica, was organized, it obtained a charter extending over a period of fifty years. Under this charter and by virtue of the statute, it condemned and took a strip of land running through the plaintiff's farm. Subsequently the road was consolidated with several others, and became the New York Central and Hudson River road, and has ever since continued to use this strip as a part of its roadway. The charter of the New York Central and Hudson River Railroad Company was granted for half a century. The original charter of the Tonawanda railroad has expired and plaintiff brings suit to eject the railroad company and recover possession of the land, claiming that with the expiration of the

charter the land no longer belonged to the railroad company:

*Held*, that the public use for which the lands were originally taken is still continued, and such use was not limited in time. Although the corporation was at first created only for the term of fifty years, yet the legislature reserved to itself the right at any time to alter, modify or repeal the act.

*Held*, further, that whilst the plaintiff is the owner in fee of the lands in question, it is subject to a public use by the defendant for railroad purposes, and that the time that the use shall continue is within the discretion of the legislature, and that as the legislature has seen fit to authorize its consolidation with other corporations and to extend its corporate term for the period of five hundred years, such use has not as yet ceased and determined, and consequently the plaintiff cannot recover. (*Terry* agt. *New York Central and Hudson River Railroad Company*, ante, 439.)

## See TAXES AND ASSESSMENTS.

*People on the Relation of the Wallkill Valley R. R. Co.* agt. *Keator et al.*, ante, 277.

## RECEIVER.

1. In an action brought by plaintiff to foreclose a mortgage executed by the railway company to secure the issue of certain bonds, said railway extended in part through the county of Orange, which county was accordingly designated as the place of trial in the action, and a motion was made at a special term, held in that county, for the appointment of receivers of the property of the railway company, and such receivers were appointed. On motion made in the first judicial district by C. and S., owners of bonds issued by the railway company to vacate the order appoint-

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ing said receivers and for the appointment of others:

*Held, first*, that the application for the appointment of receivers of this corporation is included within section 1 of chapter 878 of Laws of 1883, and should have been made in the county of New York where the principal business office of the corporation was located at the commencement of the action, or in an adjoining county, and the order made in Orange county was without jurisdiction and void.

*Second*. That the present application is properly made by and on behalf of two of the persons holding and owning bonds of the railway company secured by the mortgage.

*Third*. That the application now made for the appointment of one or more receivers of the railway company is regularly made in the first judicial district, and the order in form providing for that appointment, made in Orange county, presents no legal obstacle in the way of the exercise of this authority.

*Fourth*. As the order for the appointment of receivers was made without authority in the court to which the application for it was directed, and as it resulted from the application of the plaintiff itself, and it still asserts and maintains the regularity of the proceeding, a case seems to be made out by the facts authorizing the owners and holders of the bonds secured by the mortgage and affected by the order, to apply to the court for such redress and protection as the circumstances and the law applicable to them require in the case. (*United States Trust Co. of New York* agt. *N. Y., W. S. and B. R. Co.*, ante, 390.)

2. This court will not order a judgment debtor to deliver to a receiver, appointed in supplementary proceedings, the possession of real estate of such debtor upon which the judgment was a lien

and which could have been sold under an execution before the receiver was appointed. The judgment creditor must first exhaust his remedy under execution. (*Albany City Bank* agt. *Gaynor*, ante, 421.)

See STOCK EXCHANGE.

*Londheim et al.* agt. *White et al.*, ante, 467.)

## REFEREE.

1. A referee, under section 1019 of the Code of Civil Procedure, will not have done his duty unless he delivers his report to the clerk to be filed in case it is not taken up by one of the attorneys within sixty days. (*Little* agt. *Lynch*, ante, 1.)
2. Notification to the plaintiff's or defendant's attorneys by the referee that his report is ready and at their disposal, on payment of his fees (naming the amount), is not to be deemed a sufficient delivery to prevent the forfeiture of his fees or the termination of the reference under this section of the Code. (*Id.*)
3. See *Thornton* agt. *Thornton*, 68 *How.*, 119, where the same cases are cited and a different conclusion reached by HAIGHT, J. (*Id.*)
4. A referee appointed to pass the assignee's accounts, and to hear and determine the issues raised by objections to certain claims has the power to extend the time in which other claims may be filed, so as to entitle them to a distributive share in the assets. (*Matter of the Objection filed by Woodward and Worthington*, ante, 359.)

## REFERENCE.

1. Where a judgment entered upon the report of a referee is reversed

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by the general term, upon questions of fact, in reviewing its decision here the decision of the referee will be upheld, unless it appears to be manifestly against or contrary to evidence. If it appear, upon examination of the whole evidence presented by the record, that it has force sufficient to uphold the findings of the referee, or if the evidence is so balanced, it can be seen that inferences drawn from the appearance and manner of testifying of the witnesses might turn the scale, it may be assumed that there were circumstances of the kind proper for the consideration of the referee, and that they affected his determination, and in such case his conclusions will be sustained. (*Sherwood* agt. *Hauser*, 94 N. Y., 626.)

## REFEREES' FEES.

1. Referees to sell in foreclosure are entitled to nothing more than the fees that are prescribed by the act of 1863 (and 1874), and cannot make a valid contract for the payment of more than the statutory fees. (*Brady* agt. *Kingsland*, ante, 168.)

## REPEAL OF STATUTE.

1. Repeals of statutes by implication are not to be favored, but on the contrary courts are bound to uphold the former statute, if the two acts can stand together, unless it is expressly repealed, or the intent to repeal is very manifest. (*N. Y., Lake Erie and Western R. Co.* agt. *Supervisors of Delaware Co.*, ante, 5.)
2. To work a repeal by implication, the intent of the legislature must be very apparent, or the two laws must be so incongruous and repugnant that effect cannot be given to both. (*Id.*)

3. A special law providing for a case or class of cases, is not to be regarded as partially repealed or amended by a general statute, unless the intention of the legislature to alter that particular law is very obvious. (*Id.*)

4. When it is manifest that the legislature intended the latter statute as a substitute for the former, the latter may abrogate the former, although not entirely repugnant to it. (*Id.*)

5. Applying these rules to the statute of 1837, providing for the assessment of highway labor upon moneyed or stock corporations:

*Held*, that the statute of 1866 was not intended to repeal that of 1837, and that it was not intended as a substitute for it, or any part thereof; but that it was intended to apply only to this general law as it then stood in the Revised Statutes; nor was there any such manifest intent on the part of the legislature to substitute the general provisions of the statute of 1866 for the special ones of the act of 1837, as would work a repeal of the latter by implication.

*Held*, further, that the commissioners of highways of a town have the power to assess a moneyed or stock corporation having property therein for highway labor to be performed in a road district in such town other than that in which such property is situated. (*Id.*)

## RESIDENCE.

See DIVORCE.

*De Meli* agt. *De Meli*, ante, 26.

## ROBBERY.

1. Antecedent consideration is not sufficient to enable the holder of stolen negotiable bonds to hold them against the loser and owner before the robbery. (*Northampton*

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*National Bank* agt. *Kidder*, ante, 95.)

2. Possession does not create a presumption of ownership in the case of negotiable paper shown to have been stolen. The robbery reverses the usual rule as to the presumption. The holder after the robbery has the burden on him to prove value paid and parted with contemporaneously, good faith, purchase before maturity, &c. (*Wylie* agt. *Speyer*, 62 *How.*, 110, approved). (*Id.*)

## SHERIFF.

1. An injunction order of the United States court staying the sheriff's proceedings operates to extend the time in which he is bound to make return of the execution by as many days as he was under stay. (*Ansonia Brass and Copper Company* agt. *Conner*, ante, 157.)

See BAIL.

*People ex rel. Tully* agt. *Davidson*, ante, 416.

2. This action was brought upon a bond given to the sheriff of New York, to indemnify him against all liability and damages that might arise or happen by reason of his levying upon, attaching and selling certain personal property, supposed to belong to one Brodie, under and by virtue of an execution issued upon a judgment recovered against that person: *Held*, that the sheriff had a right to demand and receive such a bond, and that it was not void as taken *colore officii*. (*O'Donohue* agt. *Simmons*, 81 *Hun*, 267.)

8. The property levied upon was of the value of from \$12,000 to \$14,000, and a judgment for \$16,922.85 for its wrongful seizure was subsequently recovered against the sheriff. Only \$2,054.05 was made upon the execution

over the expenses of the sale. The court was requested to submit to the jury the question "whether or not the judgment against O'Brien (the sheriff) was not recovered in part for his unlawful oppression and illegal acts committed by him, not covered by the execution or the bond of indemnity:" *Held*, that the court erred in refusing so to charge, as the sureties were only bound to pay or indemnify the sheriff, so far as his liability arose, out of what was done in the way of seizing the property and appropriating it to the payment of the debt mentioned in the execution, and not for what was occasioned by the wrongful or negligent acts of the sheriff or his officers. (*Id.*)

4. Attachment — the fees and expenses of the sheriff are to be adjusted by the judge issuing the warrant — they cannot be adjusted by the court — on an application for their adjustment no direction can be given as to the person by whom they should be paid — Code of Civil Procedure, sections 8307, subdivision 2, 3287. (*See Hall* agt. *U. S. Reflector Co.*, 81 *Hun*, 609.)
5. Action to foreclose a lien upon a chattel — Code of Civil Procedure, sections 1787, 1741 — a warrant to the sheriff to seize and hold the chattel does not protect him in taking it from the possession of one who is not a party to the action, and claims to be the owner thereof. (*See Carpenter* agt. *Lott*, 81 *Hun*, 849.)

## SHERIFF'S FEES.

1. Where a sheriff levies upon property on execution and the execution is afterwards stayed, appeal taken and judgment affirmed, and defendant pays the amount thereof directly to the plaintiff's attorney: *Held*, that such payment was a settlement within the meaning of

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section 8307, subdivision 7, of the Code of Civil Procedure, and that the sheriff was entitled to poundage and an allowance. (*Mathews* agt. *Matson*, ante, 116.)

2. On a sale of goods by the sheriff on execution which realized \$3,488.89, the sheriff's bill amounted to \$1,151.45. The plaintiff demanded a taxation of the bill, and an order was made by the court on such taxation allowing to the sheriff the whole amount charged:

*Held*, that the plaintiff had a right to demand the taxation; that the court had authority to make it, and that inasmuch as a large number of the items of the bill should have been rejected, the order should be reversed and the proceedings remanded to the special term with a direction to proceed and tax the bill in conformity to the authorities cited. (*Mallory* agt. *Reichert*, ante, 428.)

## SLEEPING CAR COMPANIES.

1. While sleeping car companies owe greater duties to their customers than ordinary railroad carriers of passengers, still they can only be held liable for property lost while under the control of the passenger, upon proof of some fault or negligence upon their part, and the mere fact of such loss, unaccompanied by any other proof, raises no presumption of negligence. (*Tracy* agt. *Pullman Palace Car Company*, ante, 154.)

## STOCK EXCHANGE.

1. A seat or membership in the New York Stock Exchange is valuable property and subject to the payment of debts. (*Londheim et al.* agt. *White et al.*, ante, 467.)
2. Although a receiver cannot, under the rules of the Stock Exchange, take an assignment of such seat

or membership, the court has power to direct an assignment to a person other than the receiver, qualified under such rules to hold it. All the rights and interests of the Stock Exchange in such seat or membership are fixed and determined and cannot be divested and infringed by any order of the court, therefore the Stock Exchange is not a necessary party to a proceeding to compel a transfer. (*Id.*)

3. In every proceeding before a club, society or association, having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge and to be fully and fairly heard. The plaintiff, a member of the New York Stock Exchange, an incorporated voluntary association, having been charged by a special committee of investigation, after taking voluminous testimony, with being guilty of improper practices, the governing committee of the exchange, who are empowered by its constitution to expel members adjudged to have been guilty of obvious fraud, preferred charges against him based upon the testimony thus taken. He was permitted to make statements and explanations before the investigating committee, and to cross-examine the witnesses produced. Then he appeared before the governing committee and read his defense at great length. At a subsequent meeting on June sixth, in his absence, two accusing witnesses were examined by the governing committee, who then negatived a proposition that these witnesses be brought again before them to be cross-examined by the accused member:

*Held, first*, that though the governing committee is not bound on the trial of a member for misconduct by the ordinary rules which obtain in judicial proceedings, yet the court should interfere for the purpose of holding the asso-

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ciation to a fair and honest administration of its rules.

*Second.* The action of the governing committee on June sixth was not just or fair to the accused member in either a legal or equitable sense, and defendants should be restrained pending the action from asserting against plaintiff the resolution of expulsion passed upon him. (*Hutchinson* agt. *Lawrence*, ante, 88.)

## STREETS.

1. The legislature has no power, so far as the rights of abutting owners are involved, to authorize the use of the streets of the city of New York for the erection of poles to conduct telegraph and telephone wires, the legislative authority over the streets being limited to a regulation of use for which the streets are held by the city in trust, which is to appropriate and keep them open as public streets; and such erection of telegraph poles is not a street use, and does not come within the terms of the trust. A telegraph company cannot therefore invoke the equitable power of the court to restrain interference by abutting owners with its poles in city streets; even though its lines have been erected under legislative sanction. (*The Metropolitan Telephone, &c. Co.* agt. *The Corwell Lead Co.*, ante, 865.)
2. Any unauthorized continuous obstruction of a public street is a public nuisance for the reason that the public are entitled to an unobstructed passage upon the streets and sidewalks of the city. (*Calanan* agt. *Gilman*, ante 464.)
3. The placing of skids across the sidewalk in front of a party's premises is a great inconvenience to the public and may be restrained at the suit of an individual who has sustained a private injury thereby. (*Id.*)

## SUPPLEMENTARY PROCEEDINGS.

1. The examination of debtors in supplementary proceedings, who had made an assignment for the benefit of creditors should not be restricted to property acquired by them since the assignment, but may cover an inquiry "concerning their property," whether equitable or legal, including their property transferred to another with the apparent intent to hinder, delay or defraud their creditors. (*Selligman et al.* agt. *Wallach et al.*, ante, 514.)

*See* RECEIVER.

*Albany City National Bank* agt. *Gaynor*, ante, 421.

*See* STOCK EXCHANGE.

*Londheim et al.* agt. *White et al.*, ante, 467.)

## SUPREME COURT CRIER'S SALARY.

1. By chapter 296 of Laws of 1865, the justices of the supreme court for the first judicial department were authorized to appoint a crier of said court in the city and county of New York, and his compensation was to be fixed by the board of supervisors:  
*Held*, that where, in pursuance of such authority, a crier was so appointed and his salary so fixed, the board of estimate and apportionment had no right, under the consolidation act (*Laws of 1882, chap. 410*), to reduce such salary during the term for which he was appointed. (*Ricketts* agt. *The Mayor, &c., of New York*, ante, 820.)
2. The consolidation act should be limited to future appointments made under its provisions without disturbing any rights which had vested prior to its enactment. (*Id.*)

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## SURETY.

1. A surety on an undertaking on which an order of arrest was granted, who swears falsely as to his pecuniary responsibility, is guilty of perjury, which is a contempt of court, and the court is empowered to punish that offense by imposing a fine sufficient to indemnify the defendant for the loss and injury he has sustained through the surety's misconduct, and by imprisoning him for six months, and until the fine is paid. (*Stephenson agt. Hanson, ante, 805.*)

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## SURROGATES.

1. Surrogates have power to compel a purchaser of real estate to take or to discharge a purchaser from taking. (*Matter of Lynch, ante, 436.*)
2. The surrogate has power, under section 2481, Code of Civil Procedure, to open, vacate or set aside decrees in final accountings of executors. (*Matter of Tilden, ante, 447.*)
3. The general term of the supreme court has the same power, and the surrogate's determination must be reviewed as if the application were original. (*Id.*)
4. Want of time in the service beyond the seas of a citation out of the surrogate's court makes such service irregular. (*Id.*)
5. The surrogate had, previous to 1874, an inherent authority to appoint guardians *ad litem* to look after the interest of next of kin, who are minors, upon final accountings by executors, and it is the duty of such guardian *ad litem* or special guardian to make special investigation into the accounts of such executors for the proper protection of the minor's interests. (*Id.*)

6. A clause in the testator's will, "with liberty to pay over the rents, &c., of the infant's one-fourth of the estate to the widow, the general guardian," cannot be construed so as to allow executors to make payment of said rents, &c., to the infants direct, and then to take the widow's receipt as authority for these payments. (*Id.*)

7. An agreement between testator's heirs regulating the rights of each and releasing several from claims for over advances by executors to such heirs, does not relieve an executor from liability for the management of the testator's personal estate. (*Id.*)

## TAXES AND ASSESSMENTS.

1. The individual property of an executor or administrator may be taken, for a tax imposed upon him in his representative character when no property of the testator can be found. And when no goods or chattels are found in the possession of the person so taxed upon which said tax might be levied by distress and sold according to law, the payment of the tax may be enforced pursuant to section 857 of the New York consolidation act (*Laws of 1882*). (*Matter of McMahon, ante, 113.*)
2. That the estate had been settled by a decree of the surrogate before these proceedings were instituted is no answer to the proceedings. The tax was imposed before such settlement took place, and it was the duty of the administrators before making a distribution under the decree to ascertain what the liabilities of the estate were, whether for taxes or otherwise. (*Id.*)
3. Where there is no error in making the assessment upon the administrators, it is no answer that they did not know of the imposition of the tax. (*Id.*)

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4. It is too late to question the quantum of a tax after proceedings have been commenced under section 857 of consolidation act. (*Id.*)
5. Where the administrators had an estate in their possession which was subject to taxation here, their failure to ascertain whether it had been so taxed previous to the distribution of such estate does not present a case for either legal or equitable interference. (*Id.*)
6. Allegations that certain charitable institutions which were beneficiaries under the will made frequent demands upon the executors for the payment of their bequests shortly after the admission of the will to probate in 1881, and that such requests were based upon the urgent need of the funds, and that such requests being complied with, the executors when notified of the imposition of the tax for the collection of which these proceedings are brought, had no moneys in their hands applicable to the payment of such taxes, is no excuse for the non-payment. (*Matter of McMahon, ante, 152.*)
7. It was the duty of the executors, before appropriating any portion of the estate to charitable purposes, to see that the debts of the estate both to individuals and to the state were provided for, and if they have omitted to do so the court is without power to afford them relief. (*Id.*)
8. In a proceeding to test the validity of an assessment levied upon a savings bank, it appeared by the oath of its treasurer that on July 1, 1883, its surplus was \$48,252.04, and that the whole of its surplus was invested in government bonds. It had the sum of \$97,750 invested in such bonds. On July 1, 1883, the bank had on deposit in the First National Bank of Ithaca the sum of \$46,978.19. The money so deposited was shown to have formed a part of the assets of the bank, but no part of its surplus. It was also shown that the bank had no other personal property liable to taxation. No United States bonds were purchased by the bank from January 1, 1883, to July first of that year. During that time the bank's surplus had increased about \$1,750, and during all this time the bank had United States bonds to an amount largely in excess of its surplus:  
*Held, first*, that as the statute under which the bank was incorporated did not authorize it to hold property consisting of money, goods or other property to be employed in it in conducting the business of the corporation, and which could not be withdrawn or divided among its members, it cannot be held that the bank had any capital, or that the money it had in the First National Bank uninvested was taxable under the provisions of the Revised Statutes. (*The People ex rel. Ithaca Savings Bank agt. Beers et al., ante, 219.*)
9. Prior to the statute of 1857 (*Laws of 1857, chap. 456, sec. 4*) the money deposited in savings banks was taxable as the personal property of the depositors, but since that statute a *savings bank* cannot be taxed on such deposits. (*Id.*)
10. When a repealing statute is itself repealed, the first statute is revived. When the legislature in 1882 repealed the statute of 1875, which repealed the act of 1867, the statute of 1867 was revived and came into full operation again. (*Id.*)
11. Under the statute of 1867, if the surplus of the savings bank was not invested in United States securities, the assessors had authority to assess the bank for its privileges and franchises as personal property, to the extent of its surplus not so invested. But this bank had the whole of such surplus invested in such securities, and therefore had nothing which was

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- liable to taxation under the statute. (*Id.*)
12. Before it can be held that there is a surplus in the hands of a savings bank, which is liable to assessment and taxation under the statute of 1867, there must be deducted from the total assets of such bank, first, the amount of all the just debts owing by it, and second, the amount of its assets which are actually invested in United States securities, and the remainder, after making both of these deductions, is the only surplus which is the subject of assessment and taxation. (*Id.*)
13. In estimating the value of railroad property within the town, the assessors are not to be governed solely by its costs, but rather, though not exclusively, by its productiveness for railroad purposes. (*People on the relation of the Walkill Valley R. R. Co. agt. Keator et al., ante, 277.*)
14. The value of railroad property must almost entirely depend upon its capacity to earn money for its owners. It should be valued as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profit of its use for that purpose. (*Id.*)
15. Upon a trial upon an issue raised upon *certiorari*, to review an assessment on railroad property, as excessive as compared with the valuation of other property in this town, where it was made to appear that while the property in the town other than the railroad property had not been assessed or valued at a greater sum than forty per cent of its actual value, computed as the statute requires it to be computed, while such railroad property had been valued and assessed at its full actual value:  
*Held*, that the valuation of the railroad property should be reduced sixty per cent. (*Id.*)
16. On *certiorari* to review an assessment, costs will not be awarded against the assessors, unless it is found that the assessors have acted in bad faith in making such assessment. (*Id.*)
17. Where the statutes provided that assessors in valuing property must assess it "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor," and upon the completion of their roll they are required to swear that they have observed that rule in the valuation of all real estate. (*The People ex rel. The Albany and Greenbush Bridge Co. agt. Weaver, ante, 477.*)
18. Where a party seeks by *certiorari* to reduce an assessment upon his property, and in return to the writ the assessors do not pretend that they have obeyed and followed these provisions of the statutes, but they declare that "the valuation made by them of the property is just and fair, and at as fair a rate and just proportion as that of other property assessed by them, according to the best of their knowledge and belief:"  
*Held*, that, as they have not certified to the court that they have followed the statute, their judgment should have no influence upon the decision. (*Id.*)
19. In determining the value of bridge property in the mode which the statute directs, the true criterion of such value must be its earning capacity, not its original cost. (*Id.*)
- See REPEAL OF STATUTE.  
*N. Y., Lake Erie and Western R. Co. agt. Supervisors of Delaware Co., ante, 5.*
- ### TELEGRAPH POLES.
1. The legislature has no power to permit, by the erection of poles for the support of electric wires in

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front of a person's premises, the taking of such person's property by impairing the use and enjoyment of the light, air and free access to his premises, which forms part of his easement in the public street, without having provided for the payment to such person of due compensation therefor. (*Tiffany et al. agt. United States Illuminating Company, ante, 73.*)

2. Whether the erection of the poles would have been a substantial impairment of the use of such easement is a question of fact. (*Id.*)

## TRIAL.

See PRACTICE.

*Haberstich agt. Fischer, ante, 318.*

## TRUSTS.

1. Where a wife is empowered by a deed of trust executed by herself and husband to apportion by will or other instrument, in writing, certain property among her children and their descendants, she cannot limit the trust estate to an estate for life in her children with remainder to their issue, but must apportion the property itself and all the rights incident to ownership. (*Stuyvesant agt. Neil, ante, 16.*)

## UNDERTAKING.

1. Where the undertaking describes a judgment by giving a different date from the date of its entry, it describes a judgment which does not exist, and the respondent need not first move to set it aside, but he can disregard it and issue execution as if no undertaking had been given. (*Dinkel agt. Wehle, ante, 86.*)
2. Where a plaintiff, desiring to appeal to the court of appeals, presents an undertaking executed by

a corporation claiming authority under chapter 486, Laws of 1881, to guaranty the fulfillment of the conditions of undertakings on appeal, he should himself execute the undertaking. (*McGean agt. MacKeller et al., ante, 273.*)

3. Although the company guaranteeing the fulfillment of the conditions of the undertaking may be in the condition described in section 3, it is the duty of the judge in each particular case to exercise his discretion as to whether the actual state of the company's business justifies the approval of the undertaking. Such approval is entirely in his discretion. (*Id.*)

4. A surety on an undertaking on which an order of arrest was granted, who swears falsely as to his pecuniary responsibility, is guilty of perjury, which is a contempt of court, and the court is empowered to punish that offense by imposing a fine sufficient to indemnify the defendant for the loss and injury he has sustained through the surety's misconduct, and by imprisoning him for six months, and until the fine is paid. (*Stephenson agt. Hanson, ante, 305.*)

5. The Fidelity and Casualty Company of New York, under the authority of chapter 486 of the Laws of 1881, being incorporated under the general laws of the state, and authorized to transact business by way of guaranteeing the fidelity of persons holding positions of public or private trust, have authority to guarantee bonds or undertakings on appeal, subject to judicial approval. (*Hurd agt. Hannibal and St. Joseph Railroad Company, ante, 516.*)

6. The act has necessarily so far modified the provisions of the Code of Civil Procedure, requiring two sureties in such an undertaking, as to dispense with them when a guaranty of this description may be given. (*Id.*)

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7. It is error for the court to refuse to permit the plaintiff to examine the officer of the company as to its liability to enter into and make the guaranty before approving or disapproving of the undertaking. (*Id.*)
8. An application for an order dispensing with or limiting the security required to stay execution on appeal to this court, may not be made here, but should be made to the court "in or from which the appeal is taken" (*Code of Civil Procedure, sec. 1312*). (*Hills agt. Peekskill Savings Bank, 95 N. Y., 675.*)

## USURY.

1. A note drawn, dated, signed, delivered, made payable and first used in the state of New York, but given for a precedent debt arising in and owing to a resident of another state, is to be governed by the usury laws of New York, and not those of the other state. (*Merchants' National Bank of St. Paul agt. Southwick, ante, 324.*)

## VERIFICATION.

1. Where an affidavit of the assignor for the benefit of creditors to the inventory, after stating as required by the statute (*subd. 5, sec. 8, chap. 468, Laws of 1877, as amended by sec. 1, chap. 318, Laws of 1878*), that the same was "in all respects just and true," added "to deponent's best knowledge, information and belief:" *Held*, that there was a substantial compliance with the statute; that it was not essential that the matter sworn to should be wholly within the actual knowledge of the debtor; and that the added words did not modify or detract from those preceding them. (*Pratt agt. Stevens, 94 N. Y., 387.*)
2. The verification to a petition upon which a citation was issued

by a surrogate, requiring an executor to show cause why he should not file an inventory, render and settle his accounts and pay a legacy, stated that the petitioner "knows the contents thereof, and that the same are true:" *Held*, that this was equivalent to saying that they are true, to the knowledge of deponent; and so, that there was a substantial compliance with the provisions of the *Code of Civil Procedure (Secs. 2534, 526)*. (*In re Macaulay, 94 N. Y., 574.*)

## WAIVER.

1. A party may waive a statutory and even a constitutional provision made for his benefit, and having once done so, he cannot ask for its protection. And so, too, by acquiescence, or failure to present objections; he may waive the question of jurisdiction, arising out of the interpretation or construction of a statute. (*Matter of the Opening of the Spuyten Duyvil Park-way, ante, 341.*)
2. A testator by his will appointed A. B. and C. his executors. The will contained a provision in substance as follows: "It is my request that A. B. and C. will consent to act as executors, and that each of them other than A. do also take and receive the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them." *Held*, that A. was not precluded by the language above quoted from enforcing a claim to be awarded the statutory commissions, even though the statutory commissions awardable under the law in force when the will was executed were precisely what the testator provided for each of his executors other than A. (*In the estate of John R. Marshall, deceased, ante, 519.*)

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## WILL.

1. The proponents of a paper which is claimed to be this decedent's will lately finished the presentation of their proofs. The contestant, through her counsel, thereupon filed an affidavit alleging facts which tend to show that the testimony of certain persons in such affidavit named "may be material" to the issues of this proceeding. The contestant also caused to be filed and to be served upon the proponents a notice to the effect that, before proceeding to introduce proofs in opposition to probate, she required the examination of the persons in such affidavit named:

*Held, first*, that the duty of producing such witnesses falls upon parties proponent, not because the statute so declares, but because, as it fails to impose that duty upon parties contestant, they can rest securely upon the fact that, until such witnesses have been produced and examined, the will cannot be admitted to probate.

*Second*. The course of the examination of witnesses brought into court by proponents at the instance of contestants, is a matter purely in the discretion of the surrogate. Such witnesses must be examined, because the law demands their examination, whenever the proper notice has been filed and the surrogate has found them to be material. They are not to be charged, so to speak, to the account of either party. They are to be examined by the surrogate. The surrogate can require counsel to assist him in the examination. Neither party can demand, as of right, the opportunity of first examining the witness who has been produced in pursuance of the notice, and neither party can demand, as of right, that his opponent shall begin such examination. The surrogate should see to it that both parties are afforded a fair opportunity for full and searching investigations. In

most instances, where witnesses shall be thus brought into court at the request of contestants, it will be the most natural course to call upon the contestants themselves to pursue the inquiry in the first instance, because, presumably, they will be better advised than their adversaries as to the precise matters which they wish and expect to prove; but in such cases a direction to the contestants to begin the inquiry, will not of itself involve any limitation upon their right of making that inquiry as searching and thorough as they would have been permitted to make it if the witness had been voluntarily produced by the opposite party and had testified in its behalf:

*Third*. As to when witnesses produced in accordance with section 2618 of the Code of Civil Procedure are to be examined, it is a mere question of the order of proof, and is entirely within the discretion of the surrogate. In the exercise of such discretion he would ordinarily permit the party applying for the examination to decide for himself when that examination should be had. (*Matter of Hoyt, ante*, 57.)

2. The testatrix, who left no descendants, by her will gave her husband certain property and one-half of the remainder of her estate, giving the other half to a brother and sister in equal shares:

*Held*, that the share of the brother, who died before the testatrix, belongs to the husband and not to the brother's heirs-at-law. (*Robins agt. McClure, ante*, 83.)

3. Where a will contained a full attestation clause, the mere non-recollection of a witness, in respect to the circumstances of its execution, will not justify a finding that the statutory requirements have been disregarded. (*Estate of Wright, ante*, 117.)
4. Where the evidence showed that

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deceased signed the paper propounded and acknowledged the signature to be his, declared the instrument to be his last will and testament, and requested the witness G. to become a witness thereto; that subsequently he requested the witness F. to sign "as a witness," but, according to his testimony, without either acknowledging the signature or declaring it to be his will; the testator is shown to be familiar with the requisite formalities attending the execution of a will; the attestation clause being faulty in that it omits to state that the witness signed at the request of the testator:

*Held*, that it is not necessary for the subscribing witnesses to a will to subscribe as witnesses in each other's presence.

The testimony of a subscribing witness who signed the will in the presence of the testator alone, is not conclusive on the question of due execution, when it appears

that it is to his interest that the will should be set aside. Under such circumstances, where the other testimony is favorable to due execution, and it is shown that the testator knew the contents of his will, and knew the formalities required for due execution, and there is an attestation clause alleging due publication, the will may be admitted to probate. (*Matter of Bogart, ante*, 813.)

5. The testator by his will devised his residuary estate to one of his sons and to his heirs; but if he died without issue, then to the testator's remaining children:

*Held*, that the contingency of the death of the son meant his death during the lifetime of the testator, and the contingency never having happened, the residuary estate vested in him absolutely. (*Leonard et al. agt. Kingsland, ante*, 481.)



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